SIXTH AMENDMENT — CONFRONTATION CLAUSE — NEW MEXICO SUPREME COURT HOLDS TWO-WAY VIDEO TESTIMONY VIOLATES CONFRONTATION CLAUSE. — *State v. Thomas*, 376 P.3d 184 (N.M. 2016).

The Confrontation Clause of the Sixth Amendment ensures that a criminal defendant has the right "to be confronted with the witnesses against him."[1] The Clause was traditionally understood to "guarantee[] the defendant a face-to-face meeting with witnesses" during trial.[2] *Maryland v. Craig*[3] clarified that the right to physical confrontation was not absolute and laid out circumstances when it could be relaxed.[4] As videoconferencing technology improves, and its use in courtrooms promises greater efficiency, cost savings, and information available to the factfinder,[5] courts have considered whether allowing a prosecution witness to testify by two-way video satisfies the Confrontation Clause. Recently, in *State v. Thomas*,[6] the New Mexico Supreme Court held that the two-way video testimony of a forensic analyst violated the defendant's Sixth Amendment right to confrontation.[7] The court's discussion of the Confrontation Clause illustrates how current U.S. Supreme Court precedent leaves courts struggling to apply established tests to two-way video testimony.

Truett Thomas was charged with kidnapping and murdering Guadalupe Ashford.[8] Drag marks led to the location of her body at the edge of a parking lot with a bloodied paver stone nearby, blood sprinkling the area.[9] She died from a series of blows and lacerations to her head.[10] DNA samples collected from her body and the paver stone matched Ashford's and Thomas's DNA; the latter's genetic material had been archived in the FBI's Combined DNA Index System database.[11] Thomas denied that he had ever met Ashford, and no one saw him near the parking lot.[12] The DNA evidence alone provided the basis for Thomas's arrest and indictment.[13]

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1 U.S. CONST. amend. VI.

2 Coy v. Iowa, 487 U.S. 1012, 1016 (1988).

3 497 U.S. 836 (1990).

4 *Id.* at 844, 850.

5 *See* Nancy Gertner, *Videoconferencing: Learning Through Screens*, 12 WM. & MARY BILL RTS. J. 769, 773, 786 (2004).

6 376 P.3d 184 (N.M. 2016).

7 *See id.* at 187.

8 *Id.* at 187–88.

9 *Id.* at 188.

10 *Id.*

11 *Id.* The database compiles DNA profiles collected by law enforcement agencies across the country. *Id.*

12 *Id.*

13 *See id.*

The trial began approximately twenty-six months after Thomas's arrest.[14] The forensic analyst who had worked on the DNA samples had moved out of state by that time.[15] Two weeks before trial, the prosecutor informed the court that the analyst might not be able to appear in person for trial and requested that she be permitted to testify by Skype, a "two-way audio-video communications application," and defense counsel consented so long as there were no "technical issues."[16] One week later, defense counsel raised the possibility that the two-way video testimony could violate the Confrontation Clause.[17] The district court ruled that the defendant "had waived any objection" to the use of two-way video by his prior consent, and the analyst appeared by two-way video at trial.[18] The video feed of the analyst was displayed to the jury, and the analyst saw only "the attorney questioning her."[19] Thomas was found guilty of both charges and sentenced consecutively to life imprisonment for the murder and eighteen years for the kidnapping.[20] He moved for a new trial based on newly available DNA evidence and raised the issue of the trial judge's conduct on social media during and after trial.[21] The district court denied his motion, and Thomas appealed directly to the New Mexico Supreme Court.[22]

The New Mexico Supreme Court reversed and remanded to the lower court to enter a judgment of acquittal on the kidnapping charge and to retry the murder charge.[23] Writing for the court, Chief Justice Daniels[24] first held that the defendant's right to a speedy trial was not violated by the twenty-six months of pretrial custody.[25] While the twenty-six month delay was long enough to prompt a speedy trial inquiry,[26] Thomas had not shown that the length and causes of the delay weighed heavily in his favor and had not presented sufficient evidence

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[14] *Id.* Thomas moved to dismiss the charges for violation of his right to a speedy trial after twenty-two months of pretrial custody. *Id.* The district court denied the motion. *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* at 189.

[19] *Id.*

[20] *Id.*

[21] *Id.* In particular, before sentencing the judge posted on a Facebook page connected with his election campaign: "In the trial I presided over, the jury returned guilty verdicts for first-degree murder and kidnapping just after lunch. Justice was served. Thank you for your prayers." *Id.*

[22] *Id.*

[23] *Id.* at 199.

[24] Chief Justice Daniels was joined by Justices Maes, Chávez, and Vigil. Justice Nakamura did not participate.

[25] *Thomas*, 376 P.3d at 189–91 (applying Barker v. Wingo, 407 U.S. 514, 530 (1972)); *see also* U.S. CONST. amend. VI; N.M. CONST. art. II, § 14.

[26] *Thomas*, 376 P.3d at 190.

that the delay caused him particularized prejudice or anxiety worse than that of other defendants jailed before their trials.[27]

The court then turned to whether the use of the two-way video testimony violated Thomas's right to confrontation.[28] As a preliminary matter, the court concluded that Thomas had not waived his right to confrontation[29] and that his objection had been preserved for appellate review.[30] The court then held that the use of two-way video in this case violated Thomas's confrontation right,[31] ostensibly adopting the U.S. Supreme Court's test in *Maryland v. Craig*.[32] *Craig* observed that the Confrontation Clause "ensure[s] the reliability of the evidence against a criminal defendant"[33] through "[t]he combined effect of [the four] elements of confrontation — physical presence, oath, cross-examination, and observation of demeanor by the trier of fact."[34] Under *Craig*, the right to physical confrontation can be denied only where necessary for public policy and where the testimony's reliability is "otherwise assured."[35] In *Craig*, a child abuse victim was questioned by the prosecutor and defense counsel out of the courtroom as one-way closed circuit television played video of the testimony in court for the defendant, judge, and jury.[36] The Court held that the defendant's confrontation rights did not guarantee an absolute right to face-to-face confrontation at trial since the presence of three of the four confrontation elements in the one-way video procedure adequately assured reliability[37] and since the trial court must find the procedure necessary to protect the child victim from trauma.[38]

In evaluating the applicability of *Craig*, Chief Justice Daniels considered the influence of *Crawford v. Washington*,[39] a later Supreme

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[27] *See id.* at 191.

[28] *Id.* (citing U.S. CONST. amend. VI; N.M. CONST. art. II, § 14). The court considered whether Thomas's right had been violated under the United States Constitution; only if the U.S. Constitution did not provide relief would the court consider Thomas's claim under the New Mexico Constitution. *Id.*

[29] *Id.* at 191–92. A valid waiver of a constitutional right must be voluntary, knowing, intelligent, and made with awareness of the potential consequences. *Id.* at 191. The record did not show that the district court had discussed with the defendant his confrontation rights. *Id.* at 191–92. There was no evidence that the defendant waived his rights knowingly and voluntarily, and so no valid waiver occurred. *Id.* at 192.

[30] *Id.* at 192–93.

[31] *Id.* at 193–95.

[32] *Id.* at 194.

[33] Maryland v. Craig, 497 U.S. 836, 845 (1990).

[34] *Id.* at 846.

[35] *Id.* at 850.

[36] *Id.* at 840–42.

[37] *Id.* at 851.

[38] *Id.* at 855.

[39] 541 U.S. 36 (2004).

Court decision.[40] *Crawford* held that the Confrontation Clause prohibits out-of-court testimonial statements unless the witness is unavailable and the defendant has had an opportunity to cross-examine her.[41] The *Thomas* court observed that while *Crawford* potentially "call[ed] into question" *Craig*'s focus on reliability, it nonetheless "reaffirmed" that the Confrontation Clause aims to ensure reliability through cross-examination.[42] Since, the *Thomas* court concluded, the "face-to-face aspect of confrontation was not at issue in *Crawford*, and *Crawford* did not overrule *Craig*,"[43] *Craig* controlled here.[44] The court held that a defendant "may not be denied a physical, face-to-face confrontation"[45] without a finding that the denial furthers an important public policy and without the "presence of other confrontation element . . . including administration of the oath, the opportunity for cross-examination, and the allowance for observation of witness demeanor by the trier of fact."[46]

Applying this test, Chief Justice Daniels noted that the district court had not made any findings that allowing the analyst to testify by two-way video was required to advance an important public policy.[47] Thus, the video testimony violated the defendant's right to confrontation.[48] Concluding that the error was not harmless,[49] the court ordered a new trial on the murder charge, finding that there was sufficient evidence to support the conviction and thus no double jeopardy concern.[50] However, the court refused to allow Thomas to be retried on the kidnapping charge.[51] The state had not put forth sufficient evidence showing that the kidnapping — moving the victim approxi-

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40 *Thomas*, 376 P.3d at 193.

41 *Crawford*, 541 U.S. at 68.

42 *Thomas*, 376 P.3d at 193.

43 *Id.*

44 *Id.* at 193–94. Chief Justice Daniels did not categorically rule out the use of video and noted that the U.S. Supreme Court had not articulated a standard for two-way video testimony. *See id.* at 194.

45 *Id.* at 194–95.

46 *Id.* at 195.

47 *Id.*

48 *Id.* The court noted that, in the alternative, the testimony was not admissible under *Crawford* because the state had not complied with the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, N.M. STAT. ANN. §§ 31-8-1 to -6 (2016), and so did not show that the witness was unavailable. *Thomas*, 376 P.3d at 192, 195.

49 *Thomas*, 376 P.3d at 195–96. A constitutional error is harmless only if "there is no reasonable possibility that the error affected the verdict," and a conviction must be reversed if the improperly admitted evidence might have contributed to the conviction. *Id.* at 195. Only DNA evidence implicated Thomas, and the analyst who testified over two-way video was the only scientist to perform measurements on the DNA. *Id.* at 196.

50 *Id.*

51 *Id.* at 198.

mately ten feet — was "separate from"[52] the murder "already in progress."[53] Since Thomas's convictions had been reversed on other grounds, the court did not rule on whether the trial judge's conduct on social media showed a lack of impartiality.[54] Chief Justice Daniels emphasized a judge's responsibility to maintain propriety in online settings, as in other public places.[55]

Relying on *Craig*, the *Thomas* court justifiably held that the two-way video testimony violated the Confrontation Clause. However, *Crawford* questioned the constitutionality of two-way video testimony by suggesting that confrontation must be face-to-face and by looking unfavorably on judicial discretion over a constitutional right. The *Thomas* court demonstrates courts' trouble with two-way video testimony because it is one of few courts to consider *Crawford* and *Craig* together and because it ultimately fashioned a new test based on *Craig*. Considering the treatment of two-way video by the Supreme Court and scholars, there are arguments for and against applying *Craig*. *Thomas* exemplifies the uncertain constitutionality of two-way video testimony in the criminal context. The shortcomings of its analysis could lead to increased judicial discretion over a defendant's confrontation right.

In 2002, the U.S. Supreme Court rejected an amendment to Rule 26(b) of the Federal Rules of Criminal Procedure that would have provided a procedure for unavailable witnesses to testify by two-way video.[56] Justice Scalia wrote in support of this rejection.[57] The Court subsequently decided *Crawford*, with Justice Scalia writing for the majority, expressing a preference for face-to-face confrontation.[58] In this open space, most, but not all, courts have applied *Craig*.[59] Yet, as Professor Marc McAllister has argued, *Craig* and *Crawford* created an ambiguity in the law with respect to the constitutionality of two-way video testimony, an area "in need of clearer guidelines."[60] As commentators have discussed, *Crawford* complicates and even undermines *Craig* by calling into question its holding that physical presence is not

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[52] *Id.* at 197.

[53] *Id.* at 198. The court was concerned that "allow[ing] a kidnapping conviction to be based upon this incidental conduct can give rise to serious injustice by increasing punishment so as to render it disproportionate to culpability." *Id.* at 197.

[54] *Id.* at 198.

[55] *Id.* at 198–99.

[56] *Id.* at 194.

[57] *See id.*

[58] *See* Crawford v. Washington, 541 U.S. 36, 44 (2004) (citing seventeenth-century English treason statutes highlighting the importance of physical, face-to-face confrontation in criminal proceedings).

[59] *See* State v. Rogerson, 855 N.W.2d 495, 501–04 (Iowa 2014) (summarizing cases).

[60] Marc Chase McAllister, *Two-Way Video Trial Testimony and the Confrontation Clause: Fashioning a Better* Craig *Test in Light of* Crawford, 34 FLA. ST. U. L. REV. 835, 835 (2007).

indispensable to the confrontation right.[61] Others have noted that by functioning as a public policy exception, the *Craig* test permits significant judicial discretion, which may be problematic in light of *Crawford*'s categorical demand.[62] The *Crawford* Court forsook *Ohio v. Roberts*'s[63] standard of substantive reliability in part because determining reliability was "unpredictable" and left too much discretion to judges.[64]

Two-way video testimony both differs from and is analogous to one-way video testimony. On the one hand, two-way video testimony is factually distinct from *Craig*'s one-way video procedure. Witnesses called by two-way video may otherwise be unavailable and unable to testify;[65] the witness's availability was not at issue in *Craig*.[66] Further, the use of two-way video can be intended "to allow a confrontation;"[67] *Craig*'s procedure aimed to prevent confrontation and the trauma it may cause to the victim.[68] In addition, two-way video can further dilute the "adversarial impact" of cross-examination[69] because, unlike in *Craig*, a witness appearing by two-way video is not in the same place as the attorneys.[70] On the other hand, as *Thomas* observed, *Craig* seemingly addresses two-way video testimony under the Confrontation Clause more directly than *Crawford*. *Craig* allowed video testimony in the courtroom.[71] The defense cross-examined the witnesses in both

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[61] *See* G. Michael Fenner, *Today's Confrontation Clause (After* Crawford *and* Melendez-Diaz*)*, 43 CREIGHTON L. REV. 35, 84 n.222 (2009); David M. Wagner, *The End of the "Virtually Constitutional"? The Confrontation Right and* Crawford v. Washington *as a Prelude to Reversal of* Maryland v. Craig, 19 REGENT U. L. REV. 469, 475 (2007).

[62] *See* Marc C. McAllister, *The Disguised Witness and* Crawford*'s Uneasy Tension with* Craig*: Bringing Uniformity to the Supreme Court's Confrontation Jurisprudence*, 58 DRAKE L. REV. 481, 510 (2010) (arguing that *Craig* permits the type of "open-ended exceptions from the confrontation requirement," *id.* (quoting *Crawford*, 541 U.S. at 54), that *Crawford* found "constitutionally suspect," *id.*).

[63] 448 U.S. 56 (1980).

[64] *Crawford*, 541 U.S. at 63 (criticizing the various indicia of reliability used by courts).

[65] *See* United States v. Yates, 438 F.3d 1307, 1331 (11th Cir. 2006) (Marcus, J., dissenting) ("[W]hen a witness is truly unavailable, the requirement of face-to-face confrontation does not apply in the first place . . . .").

[66] While the child witness in *Craig* was physically accessible, the judge found that she would have suffered extreme emotional distress and could not testify in the defendant's presence. *See* Maryland v. Craig, 497 U.S. 836, 842 (1990).

[67] *Yates*, 438 F.3d at 1332 (Marcus, J., dissenting); *cf.* United States v. Gigante, 166 F.3d 75, 81 (2d Cir. 1999) (declining to apply *Craig* to two-way video testimony that permitted the defendant and the witness to see one another face-to-face).

[68] *See Craig*, 497 U.S. at 853.

[69] Anthony Garofano, Comment, *Avoiding Virtual Justice: Video-Teleconference Testimony in Federal Criminal Trials*, 56 CATH. U. L. REV. 683, 701 (2007) (noting a decrease in adversarial impact when "the witness is separated from the cross-examining lawyer by distance and technology").

[70] *Compare* United States v. Abu Ali, 528 F.3d 210, 239 (4th Cir. 2008), *and Thomas*, 376 P.3d at 189, *with Craig*, 497 U.S. at 841.

[71] *See Craig*, 497 U.S. at 841.

Craig and *Thomas* concurrently with their testimony; in *Crawford*, however, there was no cross-examination.[72] *Crawford* may apply "only to testimonial statements made prior to trial" while *Craig* itself involved live video trial testimony.[73] As such, *Crawford* does not speak specifically to physical confrontation.[74] One interpretation follows that *Crawford* governs the type of statements introduced, and *Craig* the manner in which they are presented.[75] Thus, *Craig* more easily maps onto two-way video.

The New Mexico Supreme Court's opinion in *Thomas* exemplifies courts' struggle to determine the scope of the right the Confrontation Clause affords defendants. The *Thomas* court did not ignore precedent; it engaged with *Crawford* and *Craig* thoroughly.[76] In fact, many courts have not discussed *Crawford* to this degree when ruling on two-way video testimony.[77] *Thomas* may illustrate why. It reported *Crawford* in a confused manner and then skirted the question of its import. According to *Thomas*, *Crawford* "abandoned" and "reaffirmed" reliability as the primary aim of the Confrontation Clause,[78] but *Thomas* did not consider that reliability may be defined differently in different contexts.[79] The court in *Thomas* acknowledged that *Crawford* outlined a procedural guarantee — cross-examination — and dismissed "particular substitutes for confrontation."[80] Yet *Thomas* overlooked the procedural nature of the "confrontation elements" and left open the question whether those are substitutes for confrontation.[81] The court then concluded that *Crawford* did not influence *Craig*'s holding, disregarding the weight of *Crawford*'s dicta.[82] *Thomas*'s muddled treatment of *Crawford* illustrates that more clarity is needed regarding two-way video testimony from Congress or the U.S. Supreme Court.

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[72] *Compare id.*, *and Thomas*, 376 P.3d at 195, *with* Crawford v. Washington, 541 U.S. 36, 38 (2004).

[73] United States v. Yates, 438 F.3d 1307, 1314 n.4 (11th Cir. 2006). *Compare Craig*, 497 U.S at 851, *and Thomas*, 376 P.3d at 189, *with Crawford*, 541 U.S. at 38.

[74] *See Crawford*, 541 U.S. at 68.

[75] *See* McAllister, *supra* note 62, at 512–13.

[76] *See Thomas*, 376 P.3d at 193–95.

[77] *See, e.g.*, United States v. Abu Ali, 528 F.3d 210, 239 (4th Cir. 2008) (no discussion); Horn v. Quarterman, 508 F.3d 306, 319 (5th Cir. 2007) (noting that *Crawford* does not apply retroactively); *Yates*, 438 F.3d at 1314 n.4 (disposing of *Crawford* in a footnote); State v. Rogerson, 855 N.W.2d 495, 499 (Iowa 2014) (no discussion). *But see* State v. Jackson, 717 S.E.2d 35, 39–40 (N.C. Ct. App. 2011) (discussing *Crawford* and *Craig*).

[78] *Thomas*, 376 P.3d at 193.

[79] *See* McAllister, *supra* note 62, at 513 (distinguishing reliability for out-of-court statements, defined by judicial determination before *Crawford*, *id.*, from reliability for in-court statements, defined procedurally in *Craig*, *id.* at 514).

[80] *Thomas*, 376 P.3d at 193.

[81] *Id.* at 195.

[82] *See id.* at 193–95; *cf.* Wagner, *supra* note 61, at 474 (arguing that "to dismiss [certain explanatory phrases in *Crawford*] as dicta will be to sail against the wind of the opinion").

The *Thomas* court articulated a unique test for physical confrontation. Unlike other courts,[83] *Thomas* did not restate *Craig*'s test, though it purported to do so.[84] Instead, it modified the second prong — assurance of the testimony's reliability — to include three of the four confrontation elements: oath, cross-examination, and observation of witness demeanor.[85] This change might be felt in other areas that implicate physical confrontation concerns, such as witness disguises.[86] Additionally, two-way video testimony will generally satisfy *Thomas*'s second prong, as the three elements will typically be met remotely.[87] Consequently, the admissibility of the testimony will hinge on the judge's determination of public policy, a standard potentially as vague as the "reliability" standard *Crawford* criticized.[88] *Thomas*'s test may allow the right to confrontation to be "easily . . . dispensed with."[89]

The New Mexico Supreme Court's decision in *Thomas* illustrates how courts address the absence of face-to-face confrontation as technology offers greater efficiency in trials. The *Thomas* opinion demonstrates the need for guidance defining the constitutional limits of two-way video testimony so that lower courts are not forced to draw the lines for themselves. Determining the permissibility of two-way video testimony will grow in importance as the world continues to globalize and as more witnesses lie outside the reach of the criminal justice system.[90] The stakes of this question are especially high for a defendant whose liberty is at stake. While a bright-line rule excluding all two-way video testimony for prosecution witnesses may not be necessary or appropriate, a clearer definition of confrontation or reliability would guide counsel and judges alike and better delineate the confrontation right the Constitution guarantees.

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[83] *See, e.g.*, United States v. Abu Ali, 528 F.3d 210, 240 (4th Cir. 2008); Horn v. Quarterman, 508 F.3d 306, 317 (5th Cir. 2007); United States v. Yates, 438 F.3d 1307, 1314 (11th Cir. 2006); State v. Rogerson, 855 N.W.2d 495, 505 (Iowa 2014).

[84] *Thomas*, 376 P.3d at 194 ("We adopt the *Craig* standard . . . .").

[85] *Id.* at 195 (omitting physical presence).

[86] *See* McAllister, *supra* note 62, at 499–500, 504.

[87] *See Thomas*, 376 P.3d at 189.

[88] *See* McAllister, *supra* note 60, at 868. In *Craig*, the Court identified the important state interest in relevant statutes. *See* Maryland v. Craig, 497 U.S. 836, 853–54 (1990). Outside of the child abuse context, however, public policy is not always found in legislation, and the standard can be quite vague. *See, e.g.*, *Abu Ali*, 528 F.3d at 240–41 (government's interest in combating terrorism sufficient); United States v. Rosenau, 870 F. Supp. 2d 1109, 1113 (W.D. Wash. 2012) (government's interest in efficient disposition of international drug smuggling cases sufficient); Harrell v. State, 709 So. 2d 1364, 1369–70 (Fla. 1998) (government's interest in resolving criminal cases expeditiously sufficient). *But see, e.g.*, *Yates*, 438 F.3d at 1316 (government's interest in presenting evidence efficiently insufficient).

[89] *Craig*, 497 U.S. at 850.

[90] *Cf.* McAllister, *supra* note 60, at 838.