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**SUPREME COURT OF THE  
STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Respondent,

v.

NAVIN AVERY MILKO,

Petitioner.

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Appeal from Court of Appeals No. 55267-1-II

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**ANSWER TO PETITION FOR REVIEW**

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## I. INTRODUCTION

Consistent with state and federal case law, the trial properly permitted two medically compromised witnesses living on the East Coast to testify remotely during the COVID-19 pandemic. It is long settled that the state and federal constitutions do not guarantee a right to face-to-face testimony in all instances. *E.g.*, *State v. Foster*, 135 Wn.2d 441, 463, 957 P.2d 712 (1998); *Maryland v. Craig*, 497 U.S. 836, 849, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990).

Like courts across the nation, the trial court complied with *Craig* by making individualized findings regarding the witnesses' medical needs and the current COVID-19 transmission and death rates in Pierce County. Those uncontested findings support the court's conclusion that remote testimony was necessary to further the important policy of protecting public health during the pandemic. One witness was required to care for her medically compromised baby and could not risk contracting COVID-19 without putting the baby at risk.



The second witness had three preexisting medical conditions that greatly increased her risk of hospitalization and death if she contracted COVID-19.

There is no basis for review under RAP 13.4. To the contrary, the care taken by the parties and the trial court stands out as an example of how to appropriately safeguard the constitutional rights of the accused, and the health of medically compromised witnesses and their families, during the ongoing global health crisis.

## **II. ISSUES PRESENTED FOR REVIEW**

- A. The state and federal supreme courts have held that remote testimony satisfies the Confrontation Clause if it furthers an important public interest and the reliability of the testimony is assured. Did the trial court properly allow two medically compromised witnesses to testify remotely after finding that it was necessary to further the public health during a global pandemic, and carefully ensuring the technology used would safeguard the reliability of the testimony?
- B. If there had been a confrontation clause error, would it have been harmless, given the overwhelming untainted testimony and evidence?

### III. STATEMENT OF THE CASE

#### A. Milko Violently Attacked Multiple Women

Navin Milko has a pattern of calling sex workers to a house he does not own, holding them at knifepoint, and raping or robbing them. *E.g.*, 7/29/20 RP 37. He pled guilty to raping J.A. and a second sex worker at knifepoint in Florida, in 2009 and 2010. *State v. Milko*, \_\_ Wn. App. 2d. \_\_, 2022 WL 780128, at \*1 (March 15, 2022) (published in relevant part). After serving his Florida sentence, Milko returned to Tacoma, Washington.

Once he was back in Tacoma, Milko called five separate women and asked each of them to meet him for a paid sexual transaction. He arranged to meet each woman at a house he had entered without the owner's permission. *Id.* Each time one of the women arrived, Milko tried to take her money or rape her. *Id.*

Milko raped one of the women, B.P., while holding a knife at her throat. *Id.* at 99-103. After the rape, B.P.'s friend drove her to the hospital. *Id.* at 107. Sexual Assault Nurse Examiner Jenny Biddulph performed the rape examination. *Id.* at 108. The

ejaculate she collected from B.P.'s body was a DNA match to Milko. 7/21/20 RP 24, 26; 7/28/20 RP 134.

**B. The Case Went to Trial in July 2020—the First Year of the COVID-19 Global Pandemic**

Milko's case went to trial in July 2020, shortly after COVID-19 was declared a global pandemic and Governor Inslee had proclaimed a state of emergency. *Milko*, 2022 WL 780128, at \*1. The State moved to have two witnesses with medical issues testify remotely: Nurse Biddulph and J.A., one of Milko's Florida victims. *E.g.*, CP 180, 244, 275.

**1. At a pretrial hearing, the court extensively considered the medical needs of the witnesses and tested the audio/visual transmission**

The court held a pretrial hearing to consider the State's motion for remote testimony. The court scrutinized the medical needs of the witnesses, and the parties and court informally questioned the witnesses to consider the reliability of the remote transmission.

Biddulph appeared from Virginia. 7/14/20 RP 13. Based on medical advice, Biddulph was gravely concerned about

contracting and transmitting COVID-19 to her one-year-old baby, who had problems with feeding and maintaining her weight since birth. *Id.* at 18; CP 196, 561. Her family was exercising strict isolation protocols to prevent infection. CP 562. Traveling to Washington would require Biddulph to travel through several airports, and be exposed to COVID in hotels, restaurants, and transportation to and from airports. *Id.* at 8; CP 193-94. The baby's healthcare provider determined that the COVID-19 exposure risk was not safe. CP 196. In addition, the Virginia Department of Health recommended a two-week quarantine after out-of-state travel, which Biddulph could not follow because she needed to care for her children. 7/14/20 RP 9-10, 17; CP 562. Her husband was attending school on-line and was unable to care for the children and baby alone. 7/14/20 RP at 11. If Biddulph or her husband contracted COVID-19, they had no family members who could care for the children. CP 194. Both of their families were in Spain, and due to travel restrictions, could not travel to the United States. *Id.*

Milko's Florida victim, J.A., spoke remotely from North Carolina during the pretrial hearing. *Id.* at 23. Because J.A. suffers from diabetes, asthma, and hypertension, her doctor ordered her not to associate with others because she is at "high risk." *Id.* at 24. In addition to her medical risk, J.A. explained that her asthma made it difficult to breathe when wearing a mask for extended periods. *Id.* at 23, 26.

After thoroughly considering the medical needs, and considering any possible alternatives, the court tentatively approved the use of remote testimony. CP 562. The court explained that the county infection rate was at its highest point thus far and a "compelling interest in health and safety in the midst of a global pandemic is an important public policy that requires the court to utilize remote testimony to ensure the safety of witnesses." *Id.* at 37; CP 514-15, 560. In the pretrial ruling, the court found that the technology "was sufficient to allow anybody watching to draw conclusions about facial cues, [and] other kinds of clues that might be necessary to supplement what's

being said and thereby impact credibility.” 7/14/20 RP 39-40. But it warned that the remote testimony would be reassessed or terminated if there were technical difficulties. *Id.* at 39.

**2. Remote testimony allowed the parties and jury to hear and see the witnesses**

On the first day of trial, the court supplemented its findings regarding the necessity for remote testimony. The court submitted a Pierce County Health Department report, documenting the escalating infection and death rate. 7/15/20 RP 14; CP 277-285. The court took notice that Governor Inslee had implemented a four-phase reopening plan, but the County’s plan to proceed to Phase 2.5 was withdrawn due to rising infection rates. 7/15/20 RP at 15. The court concluded that the global pandemic is “an important public policy that requires the court to utilize remote testimony to ensure the safety of witnesses.” CP 514-15.

The court tested the remote system at least twice. 7/15/20 RP at 16. When Biddulph and J.A. testified, it was projected onto two large screens in the courtroom. CP 563-64. After the remote

testimony ended, the defense conceded that “there was no break in audio” and it was possible to see the witnesses “the entire time.” 7/21/20 RP 45. The court entered amended findings and conclusions, indicating that Microsoft Teams had “provided the functional equivalent of the temporal and physical proximity of face-to-face testimony.” CP 564. The “enhanced” audio system allowed the jurors “to understand the words, emotions, speech patterns, and articulation of each witness” and “the video captured the witnesses’ facial expressions and body language from the mid-torso to the head.” CP 563.

**C. The Court of Appeals Held that the Uncontested Findings of Medical Need Supported the Conclusion that Video Testimony Was Necessary**

On direct appeal, Milko did not challenge the trial court’s factual findings regarding Biddulph and J.A.’s medical needs. *Milko*, 2022 WL 780128, at \*5 (March 15, 2022). He only challenged the conclusion that remote testimony was *necessary* to further public policy. *Id.* He conceded that there was a valid

public policy of preventing spread of COVID-19 and he did not contest the reliability of the testimony. *Id.*

The Court of Appeals concluded that the unchallenged findings supported the conclusion that video testimony was necessary to protect the health of Biddulph and her medically-compromised baby, and to protect J.A.’s health. *Id.* at \*5-7. The Court held that “[i]n the midst of the pre-vaccine COVID-19 pandemic, a significant risk of contracting a virus that had killed hundreds of thousands of people was sufficient to establish necessity.” *Id.* \*7. In so holding, the Court stressed that “in July 2020, there still was significant uncertainty as to whether air travel was safe.” *Id.* The Court explained that the “rapid evolution of the scientific knowledge about this pandemic” underscores the need to analyze the necessity of remote testimony “on a case-by-case basis.” *Id.*

Milko filed a timely appeal. CP 551.



#### IV. ARGUMENT

##### A. Case Law Consistently Recognizes that Remote Testimony Is Constitutionally Permissible

The Court of Appeals followed well-settled case law in holding that the remote testimony was medically necessary and constitutionally permissible. The federal and state constitutions both afford the accused the right to confront and cross-examine adverse witnesses. U.S. Const. amend. VI; Const. art. 1, § 22 (amend. 10). Although face-to-face confrontation is preferred, the United States Supreme Court has long held that it “is not absolute” and “must occasionally give way to considerations of public policy and the necessities of the case.” *Craig*, 497 U.S. at 849 (internal quotation omitted). The right to confrontation “may be satisfied absent a physical, face-to-face confrontation,” when, as in this case, it “is necessary to further an important public policy” and “the reliability of the testimony is otherwise assured.” *Id.* at 850.

Nearly 25 years ago, the Washington Supreme Court held that the Washington Constitution permits remote testimony

“when necessary, and under the procedures and protections outlined in *Craig*.” *Foster*, 135 Wn.2d at 470 (upholding RCW 9A.44.150, which allows child-witness testimony through one-way video); Const. art. 1 § 22. The Court of Appeals has followed this case law and held that “[c]onsiderations of public policy and necessities of the case, in narrow circumstances, may preempt the right of a physical face-to-face encounter.” *State v. Sweidan*, 13 Wn. App. 2d 53, 63, 461 P.3d 378 (2020) (citing *Craig*, 497 U.S. at 849). The Court of Appeals noted that if the Confrontation Clause were read as requiring face-to-face confrontation without exception, it would “abrogate hearsay exceptions, a result deemed extreme.” *Id.* (citing *Ohio v. Roberts*, 448 U.S. 56, 63, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), *abrogated by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)).

After evaluating the most recent data regarding COVID-19 transmission and death, medical declarations regarding the individual witnesses, and the effectiveness of the video and audio

transmission, the trial court properly held that the two-part test set forth in *Craig* was satisfied. First, the COVID-19 pandemic constituted a serious public health emergency, and limited use of remote testimony furthered the public interest in protecting the health of the witnesses and their families. Second, the court repeatedly tested the technology used to ensure the reliability of the testimony.

**1. Consistent with this Court’s rulings, remote testimony for the medically compromised witnesses was necessary**

The Court of Appeals ruling properly applied state and federal caselaw in holding that there is an important public policy interest in protecting the health and safety of witnesses during a global pandemic. *Sweidan*, 13 Wn. App. at 68, 70 (citing *Horn v. Quarterman*, 508 F.3d 306, 320 (5th Cir. 2007) (recognizing that the State has an important interest in protecting the witness from “physical danger and suffering.”)). After individual consideration of Biddulph and J.A.’s medical issues, the trial court correctly held that having them testify remotely would

further the public policy of protecting public health. As a result, the first *Craig* factor was satisfied.

The public interest in protecting life during the COVID-19 pandemic is well documented. Throughout Washington, businesses and schools were closed.<sup>1</sup> In the summer of 2020, medical data indicated that the “risks of serious complications or death” were elevated for those with preexisting medical conditions, and transmission of the virus could be decreased by limiting exposure to others. *Colvin v. Inslee*, 195 Wn.2d 879, 886, 467 P.3d 953 (2020). In July 2020, this Court recognized that concerns about the public health emergency were “all the more serious because our understanding of this public health threat is evolving and incomplete.” *Id.* at 885. Indeed, the risk of death was so significant that Governor Inslee issued an order

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<sup>1</sup> “Coronavirus Daily News Updates, July 23,” The Seattle Times (July 23, 2020), [www.seattletimes.com/seattle-news/health/coronavirus-daily-news-updates-july-23-what-to-know-today-about-covid-19-in-the-seattle-area-washington-state-and-the-world/](http://www.seattletimes.com/seattle-news/health/coronavirus-daily-news-updates-july-23-what-to-know-today-about-covid-19-in-the-seattle-area-washington-state-and-the-world/) (last visited April 18, 2022).

commuting some criminal sentences and ordering release of certain nonviolent offenders.<sup>2</sup> This relief was not limited to incarcerated persons who had contracted the virus—it was done to prevent infection.<sup>3</sup> Recognizing the global health crisis, Washington courts were directed to “consider remote testimony” when possible.<sup>4</sup> This was consistent with steps taken by state and federal courts nationwide, encouraging the use of remote proceedings during the pandemic.<sup>5</sup>

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<sup>2</sup> See Emergency Commutation in Response to COVID-19 (April 15, 2020) [https://www.governor.wa.gov/sites/default/files/COVID-19%20-%20Commutation%20Order%204.15.20%20%28tmp%29.pdf?utm\\_medium=email&utm\\_source=govdelivery](https://www.governor.wa.gov/sites/default/files/COVID-19%20-%20Commutation%20Order%204.15.20%20%28tmp%29.pdf?utm_medium=email&utm_source=govdelivery)

<sup>3</sup> See Emergency Commutation at 1.

<sup>4</sup> *Resuming Jury Trials in Washington State: Guidelines for Operations during the COVID-19 Pandemic*, Washington Courts (June 2020). (<http://www.courts.wa.gov/content/publicUpload/COVID19%20Response/Resuming%20Jury%20Trials%20in%20Washington%20State.PDF>)

<sup>5</sup> *Courts’ Responses to the Covid-19 Crisis*, Brennan Ctr. For Justice (Sept. 2020), <https://www.brennancenter.org/our-work/research-reports/courts-responses-covid-19-crisis>

The trial court properly followed that directive with respect to Biddulph and J.A.’s testimony. As required by the first *Craig* factor, the trial court entered individualized findings regarding the necessity of remote testimony. *See Craig*, 497 U.S. at 855-56 (mandating an individualized finding of necessity to protect the welfare of the witness seeking to testify remotely). With respect to Biddulph, her baby’s medical condition necessitated remote testimony. The baby was under a year old and was medically compromised.<sup>6</sup> CP 196, 561. Traveling from her home in Virginia would have required Biddulph to expose herself to COVID-19 at multiple airports, a hotel, in the transportation from the airport to the courthouse, and in the courthouse itself.<sup>7</sup> 7/7/20 RP 8; CP 193-94, 511. It was the

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<sup>6</sup> The American Academy of Pediatrics reports that to date, children represent 19% of reported COVID-19 cases in the United States. [www.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/children-and-covid-19-state-level-data-report](http://www.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/children-and-covid-19-state-level-data-report) (last visited April 8, 2022).

<sup>7</sup> As the Court of Appeals noted, “it is important to recognize that in July 2020, there still was significant uncertainty as to whether air travel was safe.” *Milko*, 2022 WL 780128, at \*7.

opinion of the child's healthcare provider that this would put the baby at undue risk. CP 196, 511.

In addition to showing that Biddulph needed to care for her medically compromised child, the State demonstrated that another caregiver could not have cared for Biddulph's children if she quarantined for two weeks after testifying, or if she contracted COVID-19. CP 511; *see Sweidan*, 13 Wn. App. 2d at 71, 73 (indicating "[n]o reason exists to distinguish between the aching of the witness and the hurting of a witness's close family member" if there is evidence that a substitute caregiver is not available). The record shows that it was necessary for Biddulph to stop working to care for the baby, as well as her other two young children. CP 194. Her husband could not care for the children and baby alone, because he was attending school online. 7/14/20 RP 11. In the event that Biddulph or her husband contracted COVID-19, they did not have friends or family who could care for the children. CP 194. Both of their families were in Spain, and due to international travel restrictions, could not

travel to the United States. *Id.*; CP 511. Having explored all reasonable options and alternatives, the trial court’s finding of necessity was supported by sufficient evidence.

Milko suggests that nothing short of physical impossibility is sufficient to support a finding of necessity. There is no case law to support this. To the contrary, “[t]he law rarely, if ever, requires absolute or indispensable necessity in any setting.” *Sweidan*, 13 Wn. App. 2d at 72 (citing *Central Puget Sound Regional Transit Auth. v. WR-SRI 120th N. LLC*, 191 Wn.2d 223, 245, 422 P.3d 891 (2018)). While necessity connotes more than mere convenience, it does *not* require “absolute physical necessity.” *Sweidan*, 13 Wn. App. 2d at 72.

With respect to J.A., the trial court determined that her preexisting medical conditions—including diabetes, asthma, and hypertension—put her at increased risk of serious complications if she were to contract COVID-19. CP 512. The court found that like Biddulph, J.A. had been exercising strict protocols in her



home to remain safe. *Id.* The court also noted that J.A.’s asthma made it difficult for her to wear a mask. *Id.*

The Centers for Disease Control (CDC) advises people with asthma to wear a mask. But the CDC also warns that “[p]eople with moderate-to-severe or uncontrolled asthma are more likely to be hospitalized from COVID-19” and recommends that they “avoid non-essential travel.”<sup>8</sup> In addition, the CDC determined that individuals with diabetes, or hypertension, are more likely to get “severely ill” from COVID-19, requiring “hospitalization, intensive care, a ventilator to help them breathe, or they may even die.”<sup>9</sup> According to the CDC, diabetes alone increases the odds of in-hospital mortality by twenty percent. “Comorbid conditions” increase the risk of

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<sup>8</sup> [www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/asthma.html#:~:text=People%20with%20moderate-to,steps%20to%20protect%20yourself](http://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/asthma.html#:~:text=People%20with%20moderate-to,steps%20to%20protect%20yourself).

<sup>9</sup> [www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html](http://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html)

death.<sup>10</sup> Thus, allowing J.A. to testify remotely furthered the important public policy of protecting the medically compromised from serious medical risks, including a significant risk of death.

Despite this, Milko contends that remote testimony was merely a matter of convenience. Pet. at 2, 23. Remote testimony is not permitted “merely to avoid added expense or inconvenience.” *United States v. Carter*, 907 F.3d 1199, 1208 (9th Cir. 2018). But as the Ninth Circuit indicated in *Carter*, there are times when “it is truly necessary to forgo physical confrontation at trial due to a witness’s medical condition.” *Id.* at 1208-09.

In keeping with *Carter* and *Craig*, courts have found that the important public interest in the health of trial participants necessitated that witnesses with serious health concerns testify

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<sup>10</sup> [www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-care/underlyingconditions.html](http://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-care/underlyingconditions.html)

remotely.<sup>11</sup> During the global pandemic, travel is not just an “inconvenience” for compromised individuals. Indeed, the potentially lethal COVID-19 risk posed by travel lead 27 States and the District of Columbia to issue at least one executive order restricting travel during the pandemic.<sup>12</sup>

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<sup>11</sup> See, e.g., *Lipsitz v. State*, 135 Nev. 131, 442 P.3d 138 (Nev. 2019) (holding out-of-state victim was properly permitted to testify from drug treatment facility); *State v. Sewell*, 595 N.W.2d 207 (Minn. 2019) (holding remote testimony of out-of-state witness recovering from surgery did not violate the Confrontation Clause); *New York v. Wrotten*, 14 N.Y.3d 33, 923 N.E.2d 1099 (N.Y. 2009) (rejecting challenge to remote testimony of a senior citizen with coronary disease); *Bush v. State*, 2008 WY 108, 193 P.3d 203 (Wyo. 2008) (allowing witness with preexisting medical issues to testify remotely); *Stevens v. State*, 234 S.W.3d 748 (Tex. App. Fort Worth 2007) (upholding remote testimony of 75-year-old witness with medical problems); *Horn v. Quarterman*, 508 F.3d 306, 320 (5th Cir. 2007) (allowing cancer patient to testify remotely in a murder trial); *United States v. Gigante*, 166 F.3d 75, 79-82 (2d Cir. 1999) (remote testimony of terminally-ill witness did not violate Confrontation Clause).

<sup>12</sup> “Map of Active Travel Restrictions by State,” BallotPedia, [www.ballotpedia.org/Travel\\_restrictions\\_issued\\_by\\_states\\_in\\_response\\_to\\_the\\_coronavirus\\_\(COVID-19\)\\_pandemic,\\_2020-2021#Map\\_of\\_active\\_travel\\_restrictions\\_by\\_state](http://www.ballotpedia.org/Travel_restrictions_issued_by_states_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020-2021#Map_of_active_travel_restrictions_by_state).

In addition to establishing medical necessity, the record reflects that Biddulph and J.A.’s medical risks could not be addressed by continuing the trial date. In *Carter*, for example, the witness’s health problem during the seventh month of her pregnancy was a “temporary disability” and the “obvious alternative” was a short trial continuance. *Carter*, 907 F.3d at 1208. Unfortunately, a short continuation would not have resolved the pandemic and at the time of trial there was no way of knowing when a vaccine would be available.<sup>13</sup>

Milko contends that there are no cases allowing witnesses who “merely risked becoming sick” to testify remotely. Pet. at 22-24. Not so. Two weeks before Milko’s petition was filed, Division I of the Court of Appeals held that it was appropriate to allow a child victim and her mother to testify remotely during the COVID-19 pandemic. *State v. D.K.*, \_\_\_ P.3d \_\_\_, 2022 WL

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<sup>13</sup> See CDC Museum Covid Timeline <https://www.cdc.gov/museum/timeline/covid19.html> (Last visited April 18, 2022).

1074986 (March 14, 2022). As in Milko's case, the witnesses were not sick. *Id.* at \*1. The victim had preexisting medical issues that made her immunocompromised. *Id.* Her mother was her primary caretaker and the child's physician declared that if the mother contracted COVID-19 she was almost certain to infect the child. *Id.* The trial court found that neither witness was eligible for a COVID-19 vaccine at the time of trial, and a new variant was becoming more prevalent. *Id.* at \*4. Given the individualized findings, the Court of Appeals upheld the trial court's determination of necessity. *Id.*

As in Washington, other state courts have recognized that when individualized findings demonstrate that there is a necessity to prevent illness, the first prong of the *Craig* test is satisfied. *See, e.g., State v. Tate*, 969 N.W.2d 378 (2022) (holding that Confrontation Clause rights were not violated by police officer's remote testimony, following findings of particularized necessity to quarantine after exposure to a COVID-19 positive individual); *People v. Hernandez*, 2021 CO

45, 488 P.3d 1055 (Colo. 2020) (holding that two-way videoconference testimony was necessary to further the important public policy of preventing the spread of COVID-19); *Clarrington v. State*, 45 Fla. L. Weekly D2671, 314 So.3d 495 (Fla. 2020); *United States v. Donziger*, No. 11-cv-691, 2020 WL 8465435 (S.D. N.Y., Slip. Op. Oct. 23, 2020) (allowing remote testimony and indicating that “there is no question that limiting the spread of COVID-19 and protecting at-risk individuals from exposure to the virus are critically important public policies”); *Commonwealth v. Masa*, 1981 CR 0307, 2020 WL 4743019 (Mass. 2020) (remote suppression hearing during the COVID-19 pandemic was necessary to protect the health of all participants); *People v. Warner*, 2020 WL 8019120 (V.I. Nov. 2020) (allowing healthy 75-year-old woman to testify remotely from Germany to avoid exposure to COVID-19); *United States v. Harris*, 2019 WL 178641 (D. Haw. Jan. 11, 2019) (allowing remote testimony where witnesses’ ability to travel to Hawaii was impaired by their children’s infirmities and spouse’s military deployment). There

is no case law holding that only persons who are presently ill may testify remotely. By analogy, child witnesses are permitted to testify when they *may become* traumatized by the defendant's presence. *See Craig*, 497 U.S. at 856.

Milko claims to have found contrary authority, but the cases he cites are distinguishable. For example, in *United States v. Pangelinan*, 2020 WL 5118550 (D. Kansas 2020), the court agreed that video testimony "might be a reasonable resolution" given the expert witnesses' health concerns with travel and "these unprecedented times with the virus." *Id.* at \*4. However, it was not necessary to do so because there were alternatives. *Id.* The witnesses were called to translate telephone calls. The court held that the State could offer the same testimony by using a local translator. *Id.* But in Milko's trial, there was not a local substitute available who could testify regarding the rape examination performed by Biddulph. And of course, there was not a local substitute to testify for J.A., regarding the rape she suffered in Florida.

Milko similarly omits key aspects of the decision in *United States v. Casher*, 2020 WL 3270541 (D. Mont. Sept. 2020). In *Casher*, a Montana court denied a request that out-of-state witnesses be allowed to testify remotely due to concerns with the risk of contracting COVID-19. One of the witnesses had underlying health conditions that created a higher risk of complications from COVID-19. *Id.* at \*1. But in stark contrast to the rising infection and death rates in Washington, the court found that “Montana has the lowest per-capita rate of infections in the United States, other than Hawaii.” *Id.* at \*3. As a result, there was a “favorable window of opportunity” to proceed to trial. *Id.* (internal citation omitted).

In sum, courts in Washington and nationwide have recognized that remote testimony during the COVID-19 pandemic has been necessary, when it was supported by findings regarding the medical needs of the witness and the risk presented by the pandemic at that location and date. The first factor under *Craig* was satisfied by the court’s examination of the specific



health risks travel posed to Biddulph and J.A., and determination that allowing them to testify remotely would further the important public policy of protecting health and safety during a global pandemic. The decision comports with state and federal case law, as well as this Court’s recognition of the significant health risk COVID-19 posed in the summer of 2020.

**2. An individualized determination was made to ensure the reliability of each witness’s testimony**

The trial court ensured that the second prong of the *Craig* test was satisfied by demanding use of a high-quality platform that enabled the Court, the defendant, witnesses, and counsel to see, hear, and speak to each other. *Craig* holds that “the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation.” *Craig*, 497 U.S. at 857. Milko did not appeal the trial court’s findings and conclusions regarding the reliability of the video testimony.

As in *Craig*, the remote witnesses in Milko’s trial were under oath, the defense conducted live cross-examination, and the defendant and jurors could observe the witnesses’ demeanor. The remote testimony was projected onto two large screens, showing the witnesses “from the elbows up.” 7/21/20 RP 8. The court determined that the image allowed the jury to “mak[e] credibility assessments based on body language, movements,” and other nonverbal cues. *Id.*; CP 513-14. As courts have recognized, “with today’s video conferencing technology, a virtual hearing can approximate a live physical hearing in ways that it could not previously.” *Vazquez Diaz v. Commonwealth*, 487 Ma. 336, 341-43, 167 N.E.3d 822, 831-32 (Mass. 2021).

At trial, defense counsel indicated on the record that “there was no break in audio” and it was possible to see the witness “the entire time.” 7/21/20 RP 11 at 45. Thus, the remote testimony satisfied the second *Craig* factor as well, by assuring the reliability of the testimony.

**B. Given the Overwhelming Evidence, a Confrontation Clause Error Would Have Been Harmless**

Even if Milko’s confrontation rights had been violated—and they were not—his claim would fail. Violation of the Confrontation Clause is subject to harmless error analysis. *State v. Lui*, 179 Wn.2d 457, 495, 315 P.3d 493 (2014). Any constitutional error would have been harmless because the “overwhelming untainted evidence” necessarily would have led the jury to a finding of guilt on all charges. *Lui*, 179 Wn.2d at 495. Because any error in allowing the remote testimony was harmless, violation of Milko’s rights under the Confrontation Clause would not require a new trial. *Sweidan*, 13 Wn. App. at 78.

Milko’s scant claims as to each witness fall flat. First, the State did not require Biddulph’s testimony to bolster B.P.’s credibility. B.P.’s credibility was supported in a myriad of ways, including testimony from the woman who drove a traumatized B.P. to the hospital and from the officer who collected B.P.’s

rape kit and clothing from the hospital and admitted it into evidence. 7/20/20 RP 143-44; 7/21/20 RP 90.

Biddulph's testimony offered information about the rape examination and collection of DNA. If she had not testified, the jury would still have heard from forensic scientist Jennifer Hayden, who testified that she performed the DNA analysis and the sample from B.P.'s rape kit matched Milko's DNA. *Id.* at 134. The State built a rock-solid case by presenting layers of testimony and DNA evidence. Given this overwhelming evidence, if allowing Biddulph's remote testimony was improper, the error was harmless.

The same is true of the testimony of the second remote witness, J.A. Even if her remote testimony is determined to be improper, the error was harmless given the overwhelming untainted evidence of intent, based on markedly similar criminal behavior in Florida. The jury heard the testimony of Temple Terrace police officer Michael Zimmerman, who investigated the rapes Milko committed in Florida. He testified that on

different days, Milko contacted women to meet him at a house, took each woman behind the house, and raped her. 7/29/20 RP 9. *Id.* at 29, 33, 35-36, 37. One of these women was J.A. Officer Zimmerman also testified that Milko made a statement admitting that he forced two women to have sex with him at knifepoint. *Id.* at 37. Thus, the officer provided a more complete picture of Milko's criminal actions in Florida.

Given the overwhelming, untainted evidence presented to the jury regarding the DNA evidence supporting the rape charge, and the testimony of the Florida police officer showing a near identical pattern of raping sex workers at knifepoint, any error in admitting the remote testimony was harmless.

## **V. CONCLUSION**

The State requests that the Court deny the petition for review. There is no basis for review under RAP 13.4. The decision to allow limited remote testimony for two medically compromised witnesses complies with long settled case law allowing remote testimony when it is necessary and sufficiently

reliable. In addition, any error in this case would have been harmless, given the overwhelming, unchallenged evidence.

This document contains 4,956 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 21st day of April, 2022.

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The undersigned certifies that on this day she delivered by E-file to the attorney of record for the petitioner true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

4/21/2022  
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s/ Kimberly Hale  
Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

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