Supreme Court No. 100908-9
No. 82596-8-I

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

D.K.,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

D.K., the petitioner, asks this Court to grant review of the Court of Appeals' decision terminating review. Following the State's motion to publish, the Court of Appeals issued its published opinion affirming D.K.'s guilty adjudication on April 6, 2022.[1]

B. ISSUES FOR WHICH REVIEW SHOULD BE GRANTED.

1. Whether the necessity exception to confrontation announced in Maryland v. Craig,[2] which permits a child witness to testify by video outside the physical presence of a defendant if in-person testimony would cause serious trauma, also permits witnesses to testify by video in order to mitigate a risk of contracting COVID-19?

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[1] The published opinion and the order granting the State's motion to publish are attached in Appendix A.

[2] 497 U.S. 836, 850, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990).

2. If the necessity exception applies, whether the State met its burden to show it was necessary to have two witnesses testify by video where the trial court failed to consider the possibility of depositions and also failed to find any risk of contracting COVID-19 could not be sufficiently mitigated through cautionary measures?

C. STATEMENT OF THE CASE

A full recitation of the facts is contained in D.K.'s opening brief.

To summarize, in the summer of 2019, D.K., a 16-year-old boy, was accused of sexual misconduct involving his younger sibling, S.W., a 10-year old girl. The accusation was made by S.W. to their mother, Shay McMahon. D.K. denied the accusation.

Nonetheless, the prosecution charged D.K. with one count of child molestation in the first degree in juvenile court. CP 1.

After several continuances, some due to the pandemic, the trial occurred in March 2021. Before trial, the prosecution moved to permit S.W. and Ms. McMahon to testify using the internet from their home. CP 51-66. D.K., facing grave consequences if found guilty, opposed the request and sought to exercise his right to confrontation. CP 66-77. Without holding an evidentiary hearing and relying on declarations that COVID-19 posed an increased risk to S.W. and Ms. McMahon, the court granted the prosecution's request. CP 83-85; RP 51-61. The court did not consider whether precautionary measures, such as masking, restrictions on spectators, ventilation, air filtration, or requiring negative COVID-19 tests, would sufficiently mitigate any risk from testifying in court. The court also did not consider whether D.K.'s right to confrontation could be preserved through a deposition in a safe location where the risk from contracting COVID-19 would be minimal.

Besides the remote testimony from S.W. and Ms. McMahon, the court heard *in-person testimony* from four

witnesses: a police officer, two detectives, and a nurse practitioner. RP 136-311.

Following the trial, the court acquitted D.K. of the charge of child molestation in the first degree, finding the prosecution did not prove the allegation of a physical touching beyond a reasonable doubt. CP 100 (FF 33); RP 527-28. But the court found D.K. guilty of the lesser included offense of attempted child molestation in the first degree. CP 86, 110-11; RP 510.

On appeal, D.K. argued his constitutional right to confrontation was violated through the use of video testimony. Believing the issue to be one of first impression in Washington as it related to COVID-19, D.K. requested oral argument after the case was set without oral argument. The Court of Appeals denied his request. The judges assigned to the appeal met on March 9, 2022 to decide how to rule. Less than a week later on March 14, the court issued an unpublished opinion rejecting D.K.'s arguments and affirming his guilty adjudication. The

opinion was authored by Judge Marlin Appelwick, who was set to retire on March 31, 2022.[3]

The State immediately moved to publish, filing its motion several hours after the opinion was issued. App. B.[4] Without calling for an answer from D.K. and in violation of RAP 12.3(e),[5] the Court of Appeals issued an order granting the State's motion to publish on April 6, 2022.

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[3] https://www.governor.wa.gov/sites/default/files/Notice%20of%20Vacancy%20COA%20Div%20I%20-%20February%202022.pdf

[4] The State's motion to publish is attached in Appendix B.

[5] RAP 12.3(e) ("A party should not file an answer to a motion to publish or a reply to an answer unless requested by the appellate court. The court will not grant a motion to publish without requesting an answer.").

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED.

1. This Court should grant review to decide whether, in light of subsequent United States Supreme Court precedent, the necessity exception to confrontation is limited to the specific factual circumstances in which it was announced.

a. In 2004, the Supreme Court determined that exceptions to the right of confrontation are limited to those that existed at the time of the founding.

Defendants have a state and federal constitutional right to confront the witnesses against them. U.S. Const. amend. VI; Const. art. I, § 22. The right is of ancient origin and can be traced back to the Roman era. Crawford v. Washington, 541 U.S. 36, 43, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). This right entitles defendants not only to cross-examination, but "to confront the witness physically," face-to-face. Davis v. Alaska, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). For example, the use of a screen between a defendant and witness violated the confrontation right. Coy v. Iowa, 487 U.S. 1012, 1020, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988).

Although the Sixth Amendment right to confrontation is not absolute, exceptions are limited to those that existed when the Sixth Amendment was ratified. Crawford, 541 U.S. at 54. As the Supreme Court very recently reiterated, "[b]ecause '[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts,' the requirement was 'most naturally read' to admit 'only those exceptions established at the time of the founding.'" Hemphill v. New York, 142 S. Ct. 681, 690, 211 L. Ed. 2d 534 (2022) (quoting Crawford, 541 U.S. at 54). For this reason, the Court refused "to approve an exception to the Confrontation Clause unheard of at the time of the founding or for 200 years thereafter." Giles v. California, 554 U.S. 353, 377, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008). "[T]he guarantee of confrontation is no guarantee at all if it is subject to whatever exceptions courts from time to time consider 'fair.'" Id. at 375.

Absent an exception, unconfronted testimony or its equivalent, testimonial statements, may not be admitted. Crawford, 541 U.S. at 59. Exceptions that existed at the time of the founding are limited. Unconfronted testimonial statements may be admitted if the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. Crawford, 541 U.S. at 54. Unconfronted testimonial statements may also be admitted if they fall under the dying declaration or forfeiture by wrongdoing exceptions. Giles, 554 U.S. at 358-59. "Necessity" has not been recognized to be an exception that existed at the time of the founding.

Before Crawford, the Supreme Court reasoned that its "precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." Maryland v. Craig, 497 U.S. 836, 850, 110 S. Ct.

3157, 111 L. Ed. 2d 666 (1990) (citing Ohio v. Roberts, 448 U.S. 56, 64, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), abrogated by Crawford, 541 U.S. 36). Applying this framework, the Court upheld a state law that permitted the testimony of a child from outside the courtroom by one-way video. Under the procedure, the child would not see the defendant. However, the state law required there be a showing the child would suffer serious emotional distress by being in the defendant's presence, and the court required that other aspects of confrontation were preserved to ensure reliability. Id. at 851-60. This Court, in another case predating Crawford, upheld a similar statute. State v. Foster, 135 Wn.2d 441, 470-72, 957 P.2d 712 (1998) (plurality opinion).

b. The "necessity" exception to confrontation applied by the Supreme Court in 1990 did not exist at the time of the founding. It is limited to the factual circumstances of the case in which it was pronounced and cannot be used to broadly authorize unconfronted video testimony due to COVID-19.

The necessity exception was inapplicable in this case. Although Craig might broadly be read to establish a necessity exception, given Crawford, Giles, and Hemphill, this exception must be limited to the factual circumstance of the case in which it was announced. In other words, the necessity exception is limited to cases where children would suffer serious trauma from seeing the defendant. Extending it to permit two-way remote video in order to mitigate a risk that the witness will contract COVID-19 conflicts with United States Supreme Court precedent.

Recognizing that Crawford "took out [the] legs" of Craig, the Michigan Supreme Court has "read *Craig's* holding according to its narrow facts." People v. Jemison, 505 Mich. 352, 356, 952 N.W.2d 394 (2020). As the Court succinctly

reasoned, unless the case falls into the factual circumstances of Craig, Crawford governs:

> We will apply *Craig* only to the specific facts it decided: a child victim may testify against the accused by means of one-way video (or a similar *Craig*-type process) when the trial court finds, consistently with statutory authorization and through a case-specific showing of necessity, that the child needs special protection. *Craig*, 497 U.S. at 860, 110 S. Ct. 3157. The witness here was neither the victim nor a child; *Crawford* thus provides the applicable rule.

Id. at 365.

The Supreme Court of Missouri has also recognized Craig's rationale for a necessity exception is incompatible with Crawford. State v. Smith, 636 S.W.3d 576, 584-87 (Mo. 2022). Craig rested on reliability as being the touchstone for confrontation while Crawford eschewed reliability in favor of a categorical rule. Id. at 584-86. For these reasons, the Supreme Court of Missouri declared Missouri courts should only "apply *Craig* to the facts it decided: a child victim may testify against the accused by means of video (or similar *Craig* process) when

the circuit court determines, consistent with statutory authorization and through case-specific showing of necessity, that a child victim needs special protection." Id. at 587.

For these reasons, the Court of Appeals improperly extended Craig. See also Wrotten v. New York, 560 U.S. 959, 130 S. Ct. 2520, 177 L. Ed. 2d 316 (2010) (Sotomayor, J., respecting denial of certiorari) (whether confrontation right permitted use of two-way video in circumstances "strikingly different context than in *Craig*" "is not obviously answered by" that case).

2. Assuming the necessity exception to confrontation applies, the Court should grant review to decide whether video testimony was necessary where the trial court failed to find that other precautionary measures would be insufficient to mitigate any risk posed by COVID-19 to two of the witnesses.

Even assuming Craig applied, the Court of Appeals misapplied the necessity test in contravention of precedent. For a non-physical face-to-face confrontation to occur, there must be a case-specific finding that the substituted procedure (1)

necessarily furthers an important public policy and (2) assures reliability. Craig, 497 U.S. at 850; State v. Sweidan, 13 Wn. App. 2d 53, 64, 461 P.3d 378 (2020).

Necessity requires a case-specific showing. Craig, 497 U.S. at 855-56; Sweidan, 13 Wn. App. 2d at 64. Convenience or mere reasonableness are not enough to establish necessity. Sweidan, 13 Wn. App. 2d at 72-73. For example, Sweidan involved a witness who was permitted to testify remotely by video because she was caring for a relative. 13 Wn. App. 2d at 58-60. The Court of Appeals concluded there was an important public policy of alleviating physical pain and suffering, and this policy "can extend to the circumstances when the witness would attend to another's needs resulting from such suffering." Id. at 71. But the prosecution had not established the necessity of testimony by video because, among other reasons, it was not shown that another caretaker was unavailable. Id. at 72-74. In other words, alternatives that would preserve traditional

confrontation must be ruled out for video testimony to be necessary.

In a case from Division Two involving whether video testimony was necessary due to a danger of witnesses contracting COVID-19 from flying to Washington to testify, the Court of Appeals recognized these principles:

> Video testimony should be allowed only for compelling reasons. Therefore, the trial court must thoroughly consider the proffered reasons why a witness cannot appear in person and conduct an evidentiary hearing if appropriate. And the court must critically analyze those reasons to determine if they actually are necessary to further an important public interest.

State v. Milko, __ Wn. App. 2d __, 505 P.3d 1251, 1257 (2022). In Milko, this standard was satisfied because the risk to the two witnesses' health if "required to travel to Washington was significant and more than de minimis." Id. at 1257-58.

Concerning COVID-19 and necessity, the Supreme Court of Missouri has similarly recognized "generalized concerns about the virus may not override an individual's constitutional

right to confront adverse witnesses in a juvenile adjudication proceeding." C.A.R.A. v. Jackson Cty. Juvenile Office, 637 S.W.3d 50, 66 (Mo. 2022). A trial court must "make witness-specific findings to determine it was necessary for a particular witness to testify via two-way video due to an enhanced risk associated with COVID-19." Id. at 65. If "multiple viable alternatives" to video testimony exists, such as by "reducing the number of people in the courtroom," necessity is not established. Id. at 66. Any determination of necessity is undercut if the courtroom is safe enough for court staff, attorneys, or other witnesses to appear. Id.

To find necessity, the "trial court must hear evidence." Craig, 497 U.S. at 855. Here, although there was evidence that S.W. and Ms. McMahon were susceptible to COVID-19,[6] there was no specific showing that the alternative procedure of

[6] This evidence was proffered solely by declaration. The declarants were not called to testify by phone and they were not cross-examined. No evidentiary hearing was conducted.

remote video testimony was necessary to ensure the witnesses' safety. The record is bereft of COVID-19 rates in King County—the location of the court—at the time of trial in March 2021 when the witnesses testified. Low COVID-19 infection rates would have indicated any risk was mitigated. That the courtroom was safe enough for other witnesses, court staff, D.K., and defense counsel to personally appear, undercut the trial court's determination of necessity.

Measures existed that would have made the risk of contracting COVID-19 very minimal and akin to risks that people are reasonably expected to take. The witnesses could have worn highly protective masks, such as N95 respirators, which filter at least 95 percent of airborne particles.[7] The courtroom could have been well ventilated and used air-filtration systems (the record does not show that it was not well-

[7] https://en.wikipedia.org/wiki/N95_respirator; https://www.cdc.gov/niosh/npptl/topics/respirators/disp_part/n95list1.html

ventilated or lacked air-filtration). Only a small number of people needed to be in the courtroom because the case was a non-jury trial. For those in the courtroom, the court could have required everyone obtain a negative COVID-19 test result. The prosecution did not show that these measures would have been ineffective. And unlike in Milko, the trial court did not make detailed findings concerning necessity based on evidence. Given these defects, necessity was not established. See C.A.R.A., 637 S.W.3d at 65-66.

In rejecting D.K.'s argument, the Court of Appeals shifted the burden of proof to D.K., reasoning that "D.K. has not shown that S.W.'s and S.M.'s remote testimony was unnecessary." Slip op. at 9. But D.K. had no burden. Rather, the State had the burden to show that remote testimony was necessary. T.H. v. State, No. 2D20-3217, 2022 WL 815047, at *4 (Fla. Dist. Ct. App. Mar. 18, 2022) ("The burden of persuasion is upon the party seeking to abrogate the preference for physical face-to-face confrontation. The burden is not upon

T.H. to raise a case specific reason why a videoconference is inappropriate."); see Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) ("the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court"); State v. Koslowski, 166 Wn.2d 409, 417 n.3, 209 P.3d 479 (2009) (State has burden to prove statement is nontestimonial).

Necessity was also not established because depositions of S.W. and Ms. McMahon, with D.K. being physically present, were not considered by the trial court, let alone ruled out. CrR 4.6(a) (permitting trial court to order deposition when witness cannot attend trial or there is good cause). This would have preserved D.K.'s right to confrontation. See Jessica Arden Ettinger et al., Ain't Nothing Like the Real Thing: Will Coronavirus Infect the Confrontation Clause?, 44-May CHAMPION 56, 59 (2020) (suggesting this procedure). Depositions likely could have been held in an environment even

safer than the courtroom. Fewer people would be present. The site could be well-ventilated, or the examination possibly held outside. Because neither the prosecution nor the court evaluated the feasibility of depositions, the necessity of remote virtual testimony was not established. United States v. Carter, 907 F.3d 1199, 1209 (9th Cir. 2018) (two-way video testimony was not "necessary" and violated Confrontation Clause because witness could have been deposed).

The Court of Appeals rejected this argument reasoning that a deposition would not have been any safer. Slip op. at 9. But the trial court did not even consider the possibility of a deposition. Post-hoc speculation that a deposition was unfeasible is inadequate.

Both the trial court and Court of Appeals improperly determined that necessity for video testimony was established.

3. This case involves significant constitutional questions of first impression that are a matter of public interest. Review should be granted.

The two issues presented in this case meet the criteria for this Court's review. "[A] significant question of law under the Constitution of the State of Washington or of the United States is involved." RAP 13.4(b)(3). It also "involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4).

The prosecution essentially argued this in its motion to publish. Asserting that the case was the first one to address critical issues related to the constitutional right to confrontation, the State argued the decision met the criteria for publication because it "determined an unsettled or new question of law or constitutional principle" and the "decision is of general public interest or importance." App. B. at 2 (quoting RAP 12.3(e)).

As the prosecution argued, the Court of Appeals' decision in "[t]his case appears to be the first Washington opinion involving remote testimony in a criminal case related to

the COVID-19 pandemic." Id. at 3. The prosecution also argued the decision "appears to be the first Washington case expressly addressing the interplay between the U.S. Supreme Court's prior decisions in Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), and Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Id. "[I]ssues relating to COVID-19 and its impact on society are of substantial and continuing public interest." Id. at 3-4.

The prosecution was correct on these points. Review is accordingly warranted under RAP 13.4(b)(3) and (4). This Court should determine and answer the critical questions presented. The Court should grant review on both issues.

E. CONCLUSION

The limited "necessity" exception to the constitutional right to confrontation set out by the Supreme Court in Craig is inapplicable outside the context of child witnesses who may suffer serious trauma if compelled to testify face-to-face. Even if the necessity exception permitted witnesses to testify via

video due to a risk from contracting COVID-19 through in-person testimony, trial courts must carefully limit the exception to substantial risks. If the risk posed by COVID-19 can be sufficiently mitigated, the right to confrontation may not be abridged. This Court should grant review and hold that D.K.'s constitutional right to confrontation was abridged.

Respectfully submitted this 5th day of May, 2022.

This document contains 3,352 words, excluding the parts of the document exempted from the word count by RAP 18.17.

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Appendix A

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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. D.K., Appellant.	No. 82596-8-I ORDER GRANTING MOTION TO PUBLISH

The respondent, State of Washington, has filed a motion to publish. The appellant, D.K., has not filed an answer. The court has considered the motion, and a majority of the panel has reconsidered its prior determination not to publish the opinion filed for the above entitled matter on March 14, 2022 finding that it is of precedential value and should be published. Now, therefore, it is

ORDERED that the motion to publish is granted; it is further

ORDERED that the written opinion filed March 14, 2022 shall be published and printed in the Washington Appellate Reports.

Appelwick, J.P.T.
Judge Pro Tempore

FILED
3/14/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. D.K., Appellant.	No. 82596-8-I DIVISION ONE PUBLISHED OPINION

APPELWICK, J. — D.K. appeals from his conviction for attempted child molestation in the first degree. He argues that allowing witnesses to testify remotely violated his constitutional rights to confrontation under both state and federal constitutions. He also argues that the testimony of S.W. and S.M. by remote video was not necessary and was unreliable. We affirm.

FACTS

S.M. is the mother of seven children, including D.K. and S.W. In July 2019, 10 year old S.W. lived with her mom, but 16 year old D.K. lived with his father in Pasco, Washington. On July 16, 2019, D.K. arrived at S.M.'s house to spend a few weeks with his mother. S.W. testified that one night during his stay, D.K. sexually assaulted her. In the morning, S.W. told her mom what happened. D.K. left the house, and S.M took S.W. to the police station and the doctor's office.

D.K. was charged with child molestation in the first degree. The juvenile court trial began in March 2021, during the COVID-19 pandemic. Because S.W. is immunocompromised and S.M. is her caretaker and a critical witness, the State moved to permit them to testify remotely. D.K. objected to this motion, stating that it would violate his fundamental right to confront witnesses under the Sixth Amendment.

The State submitted medical evidence in support of the motion. S.W.'s doctor submitted multiple declarations stating that S.W. is under her care for two medical conditions that leave her immunocompromised. According to the physician, the unknown ramifications of COVID-19 on the nervous system meant that, "S.W. should not be out in public." The physician also stated that S.W. was not eligible for the COVID-19 vaccine at that time. S.M. and her medical provider submitted separate declarations that she is similarly immunocompromised. She too was not yet eligible for the vaccine. She also said that if she contracted COVID-19, "it is almost certain that [S.W.] would also contract COVID-19."

On February 19, 2021, the Supreme Court of Washington issued its fifth revised and extended order regarding court operations. In re Statewide Response by Washington State Courts to the COVID-19 Public Health Emergency, No. 25700-B-658, at 1 (Wash. Feb. 19, 2021), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/25700-B-658.pdf. It states, "In all court operations, courts should follow the most protective public health guidance applicable in their jurisdiction, and should continue using remote proceedings for

public health and safety whenever appropriate." Id. at 3. As to criminal trials, the order states,

> 7. The previous order suspending all criminal jury trials until at least July 6, 2020 is lifted. Trials already in session where a jury has been sworn and social distancing and other public health measures are strictly observed may proceed or be continued if the defendant agrees to a continuance. Courts have authority to conduct nonjury trials by remote means or in person, with strict observance of social distancing and other public health measures.
> 8 Courts should continue to hear out of custody criminal and juvenile offender matters by telephone, video or other means that do not require in person attendance when appropriate. In addition, courts may hear matters that require in person attendance if those hearings strictly comply with social distancing and other public health measures.

Id. at 6-7 (emphasis omitted).

At trial, the court reviewed whether S.W.'s and S.M.'s testimony could be conducted remotely through the Zoom videoconference platform. In making its determination, the court considered the risk of COVID-19, the medical evidence relating to S.W.'s and S.M.'s health, the emergency order of the Washington Supreme Court, and case law. The court found, "The facts established are sufficient to establish the need for remote testimony in this kind of a case," and granted the motion to permit video testimony.

S.W. and S.M. testified remotely at trial. At the end of direct examination, S.W. identified D.K. by describing the clothing he was wearing at that time. However, defense counsel stated later in the trial that during the course of S.W.'s testimony, the camera had shifted and S.W. was unable to see D.K. during most of her testimony on direct examination.

The court found D.K. to be guilty of attempted child molestation in the first degree. D.K. appeals.

DISCUSSION

I. Applicable Law

D.K. claims that the trial court violated his Sixth Amendment right to confrontation by allowing remote testimony. The confrontation clause of the Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him." U.S. CONST. amend. VI. This amendment applies to state prosecutions under the due process clause of the Fourteenth Amendment. State v. Sweidan, 13 Wn. App. 2d 53, 62, 461 P.3d 378 (2020). The confrontation clause guarantees a defendant a face-to-face meeting with witnesses during trial, although this right is not absolute. Maryland v. Craig, 497 U.S. 836, 844, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990).

"The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Id. at 845. The right guaranteed by the confrontation clause ensures the witness will give statements under oath, forces the witness to be cross-examined, and permits the jury, or fact finder, to observe the witness giving its statement. Id.

Two Supreme Court cases have explored the limitations of the confrontation clause: Craig, and Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Craig examined the constitutionality of one-way video testimony in child abuse cases. Craig, 497 U.S. at 854-56. The court held that

video testimony was necessary for children to testify, when those children would be traumatized by seeing the defendant in court. Id. at 856-57. According to the Court, "[The] State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." Id. at 837. In Crawford, the court prohibited tape-recorded statements offered as evidence under a hearsay analysis, and held that the inability to cross-examine the witness violated the Sixth Amendment. 541 U.S. at 40, 68-69.

D.K. argues that because of the decision in Crawford, Craig must be read narrowly, allowing video testimony in cases only where children would suffer trauma from seeing the defendant. He argues that Crawford limits exceptions to the confrontation clause to those established at the time the Constitution was founded. Under this interpretation, the exceptions occur only when the witness is unavailable and the defendant had a prior opportunity to cross-examine. If that were true, Craig would not have been constitutionally correct and should have been overruled by Crawford.

However, Crawford did not purport to overrule Craig. The United States Supreme Court "does not normally overturn, or so dramatically limit, earlier authority sub silentio." Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. 1, 18, 120 S. Ct. 1084, 146 L. Ed. 2d 1 (2000). Rather than reject Craig, Crawford mentions that opinion only once to support that cross-examination is "not an empty procedure." Crawford, 541 U.S. at 74 (Rehnquist, J., concurring). Because Crawford did not explicitly overrule Craig, the two cases must be

reconciled. Additionally, Washington cases have followed Craig since Crawford has been decided.[1] See Sweidan, 13 Wn. App. 2d at 63. Here, because Craig refers to live, remote, video testimony, we apply the rule in Craig.

II. Confrontation Clause

For the court to allow a confrontation of witnesses to occur via video, there must be a finding that the substitute procedure (1) necessarily furthers an important public policy and (2) is reliable. Craig, 497 U.S. at 850; State v. Foster, 135 Wn.2d 441, 457, 957 P.2d 712 (1998). A confrontation clause challenge is reviewed de novo. State v. Koslowski, 166 Wn.2d 409, 417, 209 P.3d 479 (2009). D.K. argues that neither element of the Craig test has been met.

A. Necessity

First, D.K. argues that the State failed to show that S.W.'s video testimony was necessary. The necessity analysis initially focused on child witnesses that would be traumatized by the presence of the defendant while testifying. Craig, 497 U.S. at 856. In Craig, the Court analyzed a Maryland statute that as a matter of public policy allowed video testimony upon a determination that a child who suffered emotional distress so much that they could not reasonably communicate during testimony. Id. at840-41, 856. In addition to the court finding necessity for

[1] The vast majority of courts outside of Washington agree that Crawford did not overrule or limit the holding in Craig. State v. Tate, 969 N.W.2d 378, 385 n.8 (Minn. Ct. App. Jan. 3, 2022). D.K. argues that we should follow an approach taken by the Supreme Court of Michigan in People v. Jemison, 505 Mich. 352, 952 N.W.2d 394 (2020). However, Jemison concedes that Crawford did not overrule Craig, and that case-specific necessity can allow for video testimony. Jemison, 505 Mich. at 365.

the video testimony, the witness must testify under oath, be subjected to full cross-examination, and must be in view of the fact-finders while doing so. Id. at 857.

Washington courts have applied a necessity analysis for the same issue using RCW 9A.44.150(1), which had substantially similar language as the Maryland statute. Foster, 135 Wn.2d at 469 (plurality opinion). In Foster, the court held that RCW 9A.44.150(1) was constitutional in allowing one-way video testimony, and therefore did not violate the confrontation clause. Id. at 469-70.

Unlike Foster, this case involves two-way video testimony and the state did not rely on RCW 9A.44.150(1) for its finding of necessity. Washington has already noted that allowing video testimony upon a finding of necessity is not limited to cases of child abuse. Sweidan, 13 Wn. App. 2d at 71. In Sweidan, the court stated "we conclude that the important policy of alleviating physical pain and suffering can extend to the circumstances when the witness would attend to another's needs resulting from such suffering." Id.

Here, the trial court found that allowing S.W. and S.M. to testify remotely was necessary. To determine this, the court looked to three factors: (1) the severity of the COVID-19 epidemic and precautions being taken at trial; (2) the risk to the particular person; and (3) if a presumption of in-person testimony had been overcome. For the first factor, the court noted that the court is being very careful, that the vaccination rate at the time was low, and that a new variant to COVID-19 was becoming more prevalent. The court then looked to S.W.'s and S.M.'s risk, finding that respiratory disease and lack of vaccine creates a high-risk category. Third, the court found that the presumption for in-person testimony had been

overcome, as S.W. would not qualify for a vaccine in the near future, and the case is too old to continue.

The court looked to the Supreme Court of Washington order regarding court operations as evidence of an important public policy. The order states that courts should continue remote proceedings "for public health and safety whenever appropriate." In re Statewide Response, No. 25700-B-658 at 3. The order granted the court authority to conduct nonjury trials remotely, and that juvenile offender matters can be conducted by video when appropriate. Id. 6-7. The Washington Supreme Court's order established a public policy allowing for remote proceedings for health and safety during COVID-19. The trial court concluded that there was a public policy reason that S.W. and S.M. should be allowed to testify remotely. We agree.

However, that is not the end of the analysis. The trial court in Sweidan found an important policy reason to allow video testimony, but it failed to make a clear finding about necessity.[2] Sweidan, 13 Wn. App. 2d at 71-72. D.K. urges the court to follow the analysis in Sweidan to determine that S.W.'s video testimony was not necessary.[3] He argues that Sweidan holds that necessity needs to show

[2] Sweidan would have remanded for an evidentiary hearing on the necessity of the videoconference testimony, but found the constitutional error to be harmless. Sweidan, 13 Wn. App. 2d at 56, 72.

[3] D.K. also argues that "the record was bereft of data about COVID-19 spread in the community." He also argues that there was no evidence about whether the courtroom was well-ventilated, whether spectators could have been kept out, or whether everyone could have been required to obtain a COVID-19 test. He also argues that the court did not evaluate whether a video deposition would be feasible. These arguments go to minimizing the risk to the witnesses. They were not explicitly raised with the trial court, though we can reasonably expect the trial court was aware of these factors. Given the medical information

that "other alternatives that would preserve traditional confrontation had not been ruled out."

Sweidan relied in part on United States v. Carter, 907 F.3d 1199, 1208 (9th Cir. 2018). Sweidan, 13 Wn. App. 2d at 73. In Carter, the court found there was no necessity for video testimony when a pregnant woman could not travel to the courtroom to testify, because her disability was temporary, and the case could be continued. Id. Additionally, in Carter, the witness could have been deposed while allowing in-person confrontation. Id. at 1209.

However, D.K. moved to compel in-person pretrial interviews. The trial court denied the motion, and stated that "medical best practice" would be to not expose S.W. to any member of the public. The trial court broadly considered alternatives for out-of-court deposition, such as counsel interviewing S.W. and S.M. at their house. However, that alternative might have decreased the risks to the witnesses, but it would not have eliminated them. The safety concerns expressed by the court would have been equally applicable. The gravity of the risk militates against the alternative, and the result would have been the same. Additionally, regarding continuation, the trial court stated that "this case is getting too old just to let us kick it around for another year." The trial court considered reasonable alternatives. D.K. has not shown that S.W.'s and S.M.'s remote testimony was unnecessary.

about the witnesses, the analysis and conclusion reached would be no different than that for the option of a video deposition.

B. Reliability

D.K. argues that the video testimony is not reliable, because the virtual testimony in this case had issues with the sound, and did not show D.K. on the screen during S.W.'s testimony on direct. .

Under Craig, reliability requires that video testimony of witnesses occur under oath, within view of the fact-finders, and with opportunity for cross-examination. Craig, 497 U.S. at 857. Here, both S.W. and S.M. were under oath, cross-examined, and viewed by the judge during the bench trial.

A condition of allowing video testimony is that the witness was able to be viewed by the defendant and the fact-finders of the court during testimony. Id. In both Craig and Foster, the courts allowed one-way video where the witness could not see the defendant. Craig, 497 U.S. at 840-41; Foster, 135 Wn.2d at 446. D.K. does not argue that he or the finder of fact was not able to observe S.W. while she testified.

D.K. argues that S.W. could not view him during her testimony on direct. This is not one of the factors courts look to when doing a reliability analysis.[4] In

[4] To the extent the witness could not see D.K., the record indicates that the camera had shifted in some way so that D.K. was out of frame. He does not argue the State or the court was responsible for the movement. The issue was fixed prior to cross-examination of the witness.

D.K. also argues that there were problems with the audio during trial. He cites to one section of the report of proceedings, where the judge says to S.W., "You cut out just right at the end. You said, that's why he stopped staying there with you guys." S.W. replied, "Yeah." However, D.K. cites to no authority that states an error of this type is unreliable. Under RAP 10.3(a)(6), the argument must have citations to legal authority, and a contention without authority need not be considered on appeal. Rhinehart v. Seattle Times, 59 Wn. App. 332, 336, 798 P.2d 1155 (1990). We do not review this issue.

Sweidan this court stated, "The record should confirm that the jury and the defendant see the witness and the witness's body language, and that they hear the witness. The record should also verify that the witness sees the jury and the defendant." Sweidan, 13 Wn. App. 2d at 75. "We do not hold, however, that any of these suggestions must necessarily be followed to fulfill the strictures of the confrontation clause." Id.

Therefore, D.K.'s argument fails to establish that S.W.'s and S.M.'s video testimony was unreliable for the purposes of the confrontation clause.

We affirm.

Appelwick, J.

WE CONCUR:

Brennan, J.

Mann, C.J.

Appendix B

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,	NO. 82596-8-I
V.	MOTION TO PUBLISH
D.K.	

1. IDENTITY OF MOVING PARTY

The State of Washington, respondent, asks for the relief designated in Part 2.

2. STATEMENT OF RELIEF SOUGHT

The State requests publication of the opinion in this case, State v. D.K., No. 82596-8-I (March 14, 2022).

3. FACTS RELEVANT TO MOTION

D.K. was convicted at a bench trial of attempted first degree child molestation. D.K., No. 82596-8 at 1. He argued his right to confrontation was violated because two witnesses testified remotely due to their risk of severe complications from COVID-19. Id. This Court rejected D.K.'s arguments and affirmed. Id.

4. GROUNDS FOR RELIEF AND ARGUMENT

A party may ask this Court to publish an opinion that has been filed for the public record. RAP 12.3(e). The Court of Appeals will determine whether an opinion should be published based on the following criteria:

(1) The applicant's interest in the matter if not a party;
(2) Applicant's reasons for believing publication is necessary;
(3) Whether the decision determines an unsettled or new question of law or constitutional principle;
(4) Whether the decision modifies, clarifies or reverses an established principle of law;
(5) Whether a decision is of general public interest or importance or
(6) Whether a case is in conflict with a prior opinion of

the court of Appeals.

RAP 12.3(e). The present case falls under RAP 12.3(e)(3) and (5).

This case appears to be the first Washington opinion involving remote testimony in a criminal case related to the COVID-19 pandemic. It also appears to be the first Washington case expressly addressing the interplay between the U.S. Supreme Court's prior decisions in Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), and Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

While the COVID-19 pandemic appears to be abating in Washington, there is always the possibility a new variant will emerge and once again necessitate more restrictive court procedures. Additionally, there are likely numerous other cases Statewide where this issue might be raised. Thus, publication will provide valuable guidance to trial courts. And, it goes

without saying, that issues relating to COVID-19 and its impact on society are of substantial and continuing public interest.

5. CONCLUSION

For the foregoing reasons, the State respectfully requests that the opinion in this case be published.

This document contains 383 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 14 day of March, 2022.

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
GAVRIEL JACOBS, WSBA # 46394
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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