

Georgia Latino Law Foundation
Virtual Judicial Internship Program

Generalized Research Memo

Constitutional Confrontation Rights and COVID-19

Natalie deLatour
Georgia State University College of Law

I. Introduction

This research guide analyzes the balance between a criminal defendant's constitutional rights under the Confrontation Clause of the Sixth Amendment of the United States Constitution and virtual court proceedings during the COVID-19 pandemic. Additional research on this topic will allow judges and court administrators to decide what role virtual proceedings will be able to play in criminal cases, while maintaining a criminal defendant's constitutional rights.

II. Scope

The purpose of this guide is to compile multiple sources and offer a research strategy for those interested in the effects of COVID-19 on a defendant's constitutional confrontation rights in court. This guide will focus on primary and secondary sources in federal law, as well as other materials relevant reference material from all jurisdictions where it proves useful for general and background information. Balancing a defendant's constitutional rights in the current landscape is an emerging area of law and thus, this guide is intended to provide a starting point for research on this topic.

III. Research Strategy & How-To

This Research Guide should be used by judges, attorneys, or researchers looking for information on a defendant's confrontations rights in light of COVID-19. Before starting my research, I formulated a research plan. However, as I expected, my research plan changed as I found the most effective and ineffective ways to find valuable information related to this legal issue. I started my research by generally researching confrontation rights to learn more about the topic overall. To start, I did a keyword search in LexisNexis: "confrontation and COVID-19," familiarizing myself with the topic.

When researching an emerging legal issue, it is important to keep up with current news related to the issue to see how the issue is constantly evolving. With some trial and error, I found that it was most

helpful to start my research with a search of current legal news articles. I went into LexisNexis, tailored my search to Law360 and did a keyword search using “confrontation and COVID-19.” This returned a wide array of news sources and expert analyses on confrontation rights in the age of COVID-19. From this initial search, I was already about to find some primary sources, such as important case law involving confrontation rights.

Next, I did a keyword search of secondary sources on both LexisNexis and Westlaw. I started with “virtual testimony and confrontation.” This returned a wide range of sources, so I then narrowed my search by jurisdiction, by selecting “Federal” and “Georgia.” With a much more manageable number of sources, I was able to narrow down sources which improved my research. Once I compiled a good number of secondary sources, I used those sources to find primary sources. I looked to the footnotes of the secondary sources to find applicable case law.

When I felt that I hit a dead end on Westlaw and LexisNexis, I turned to Google. First, I did general searches of “confrontation rights and COVID-19,” “confrontation rights and virtual testimony,” and “courts and COVID-19.” I scanned through the results for valuable resources. Because this emerging legal issue is constantly evolving, the following guide is intended to simply provide a starting point for research.

IV. Statutes

A. Federal

i. U.S. Const. amend VI – The Confrontation Clause

- a. The Confrontation Clause plays an important role in preserving the rights of defendants in the courtroom. The provision provides that a criminal defendant has the right “to be confronted with the witnesses against him.”

ii. H.R. 748 – 116th Congress (2019-2020), The CARES Act – Section 15002

- a. This Act provides for the use of video teleconferencing in certain federal criminal proceedings such as: detention hearings, initial appearances, preliminary hearings, waivers of indictment, arraignments, probation and supervised released revocation proceedings, pretrial release revocation proceedings, and appearances based on failing to appear in another district, when:
 1. The Judicial Conference of the United States finds that emergency conditions due to the pandemic have and will materially affect the functioning of federal courts; and
 2. The chief judge of the federal district court then authorizes the use of video teleconferencing.

V. Case Law

A tailored search on LexisNexis or Westlaw will provide numerous cases on confrontation rights. There are a few main cases which currently govern the law in the area. Most cases deal with witnesses who are children, mentally or physically ill, or otherwise unavailable. Because the COVID-19 pandemic is such an unexpected and novel event, the current case law must be interpreted in order to be applied to the current state of the judicial system. The following cases provide valuable information on whether virtual testimony will be able to be used in courts going forward.

Federal Cases:

***Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157 (1990)**

The Court allowed the witness, a six-year-old sexual abuse victim, to testify by one-way closed-circuit television upon determining that the child's presence in the courtroom could cause severe emotional distress. The United States Supreme Court held that a defendant's constitutional rights under the Confrontation Clause are not violated where there is no in-person confrontation at trial where denial of physical confrontation is: (1) necessary to further an important public policy and (2) where the reliability of the testimony is otherwise assured. Applying this case to the COVID-19 pandemic, in order to admit remote video testimony against a criminal defendant under the Craig Test, a court must find that a COVID-19-related health risk to a testifying witness outweighs a defendant's right to physical confrontation.

***United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006)**

The Eleventh Circuit held that two-way video testimony was unconstitutional when applying the Craig test to deny videoconferencing of witnesses from Australia. The court found that there was no compelling public policy to justify the use of video testimony.

***United States v. Gigante*, 166 F.3d 75, 79–81 (2d Cir. 1999)**

The Second Circuit held that videoconferencing is constitutional because it preserves all of the characteristics of in-court testimony because the witness was sworn, subject to cross, testified in view of the jury and the court, and testified in front of the defendant himself.

***Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004)**

The Supreme Court held that the admission of the wife's statement at trial violated the defendant's right to confrontation because the defense had no opportunity to cross-examine the wife or her statement. Justice Scalia, writing for the Supreme Court, held that "out-of-court statements by witnesses that are testimonial are barred, under the Confrontation Clause, unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable by court."

***Mendoza v. Pascual*, 2016 U.S. Dist. LEXIS 8958, 2016 WL 320951 (2016)**

The court allowed petitioner, a resident of Mexico, to attend trial by videoconference, while showing she received a passport for the purpose of attending trial but was denied a visa. The US District Court for the Southern District of Georgia held that petitioner's efforts satisfied the "good cause" standard and the petitioner had shown "compelling circumstances" existed because she would be unable to participate in litigation without testifying virtually.

***Harrell v. Butterworth*, 251 F.3d 926 (11th Cir. 2001)**

The Eleventh Circuit held that the state court did not unreasonably apply Craig by allowing one of the two witnesses to testify via videoconference because she was too sick to travel.

State Cases:

***Harrell v. State*, 709 So. 2d 1364, 1372 (Fla. 1998)**

The court allowed two-way video testimony from complainants from Argentina. The Florida Supreme Court held that "the procedure must (1) be justified, on a case-specific finding, based on important state interests, public policies, or necessities of the case and (2) must satisfy the other

three elements of confrontation – oath, cross-examination, and observation of the witness’s demeanor.” Quote by Justice Harding:

“Our nation’s Constitution is a living document that has stood the test of time and change. This point is exemplified by the fact that our Constitution is still viable today – some two hundred-plus years after our country’s birth. There was no way the founders of this nation could have foreseen the innovations that would take place throughout our country’s lifetime – changes that, up to this point, have included advances in communication, electricity, train, airplane, and automobile transportation, and even space exploration. Nor can we predict today the changes yet to come. But we can say with certainty that our Constitution, as well as this great nation, can endure any future changes while at the same time ensuring that individual rights and liberties will be upheld.”

***People v. Jemison*, 2020 Mich. LEXIS 1076 (2020).**

A defendant’s confrontation rights were violated when the trial court allowed the video testimony of a forensic analyst over defense counsel’s objections. Defendant was convicted of first-degree criminal sexual conduct largely on the basis of a vaginal swab from a rape kit containing a mixture of DNA profiles that Michigan State Police forensic scientists believed were strongly associated with the accused. The Michigan Supreme Court ruled that face-to-face requirement controls and “Crawford makes clear, for testimonial evidence, that requirement may be dispensed with only when the witness is unavailable, and the defendant had a prior chance to cross-examine the witness.” The Sixth Amendment was violated. This case has been decided in the midst of the COVID-19 pandemic in Michigan.

VI. Regulations

A. Federal

a. Federal Rules of Criminal Procedure for the United States District Courts

- i. **Rule 26. Taking Testimony** – The Supreme Court has previously rejected the notion that the Confrontation Clause can be satisfied by virtual testimony because there is no physical confrontation. The amendments to Rule 26 were not added to the Rules. Justice Scalia reasoned: “As we made clear in *Maryland v. Craig*, a purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations in the defendant’s presence – which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant’s image.”

b. Federal Rules of Evidence

- i. **Rule 403: Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reason.** The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”
 1. For example, a party may argue that it will suffer unfair prejudice if the court permits virtual video testimony because confrontation rights will be violated.
- ii. **Rule 804: Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant: (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness.

B. State

a. Georgia Superior Court Rules Amendments

i. **Ga. Unif. Super. Ct. 9.1** provides for the use of telephone conferences in pre-trial and post-trial proceedings in civil cases, also provides for the use of video conferences to the extent it provides for telephone conferences. All such conferences shall comply with applicable constitutional requirements.

ii. **Ga. Unif. Super. Ct. 9.2** permits non-jury trials to proceed entirely by remote testimony.

1. (a) Notice shall be given to the parties and the public that a proceeding will occur wholly by remote video conference;

a. 1. Such notice may be given by a website posting or similar means.

b. 2. In the event a court provides public access to a livestream of all proceedings to which the right of open courts applies, the livestream may constitute such notice, provided that notice of the livestream itself is provided through the websites of one or more of the following: the court; the clerk of court; the Council of Superior Court Judges; and the local bar association(s), if any.

2. (b) If a party or a member of the public objects to the remote proceeding, the court shall sustain or overrule such objection prior to conducting the proceeding; and

3. (c) The public shall be given an opportunity to view the remote video conference, such as by joining the video conference (although unable to participate), through a livestream, or through substantially similar means.”

VII. Secondary Sources

A. Treatises

There are a few well known treatises which outline Sixth Amendment confrontation rights, providing valuable background and introductory information into the concept of balancing constitutional rights when using virtual testimony.

- **25 Moore’s Federal Practice – Criminal Procedure §626.03 Transmitting Testimony from Another Location** – Available on LexisNexis
- **5 Weinstein’s Federal Evidence § 802.05 Hearsay in Criminal Cases** - Available on LexisNexis

B. American Law Reports

American Law Reports offer valuable primary research on a wide variety of legal issues, providing citations to case law, statutes, and other secondary materials. The following reports provide valuable information related to confrontation rights and virtual testimony of witnesses.

- **Closed-Circuit Television Witness Examination, 61 A.L.R.4th 1155.**

This annotation collects and discusses cases in which courts have determined whether a live, closed-circuit television may be used to present the testimony of a witness who is not present in a courtroom.
- **Constitutional and Statutory Validity of Judicial Videoconferencing, 115 A.L.R. 5th 509.**

This annotation collects and discusses cases concerning the constitutional and statutory validity of judicial videoconferencing.

C. Scholarly Articles & Reports

Much of the information relating to this novel legal issue outlines the positions that different practitioners and researchers and take on the role of virtual criminal proceedings. The following sources provide valuable perspectives on different members of the legal profession as to the constitutionality of virtual and remote testimony in criminal proceedings.

- [Nina J. Ginsberg, Norman L. Reimer, Lisa M. Way, Criminal Court Reopening and Public Health in the COVID-19 Era: NACDL Statement of Principles and Report](#)

[\(June 2020\)](#). Section III of this report discusses the constitutional rights that must be maintained with the use of virtual trials. The authors suggest that virtual trials offend a defendant's confrontation rights based on previous decisions made by the Supreme Court.

- [Dubin Research and Consulting, COVID-19's Next Victim? The Rights of the Accused \(May 2020\)](#). This report discusses how conducting virtual trials could violate defendant's constitutional rights in criminal proceedings. The author discusses case law relating to this legal issue and how there is a split among circuit courts as to whether virtual testimony is constitutional.
- [Ayyan Zubair, Work May Move Online, but the Courts Should Not in Criminal Cases, Judges and Judiciary, Criminal, Constitutional Law \(Mar. 26, 2020\)](#). This article discusses the ways in which conducting criminal cases virtually could violate the constitutional rights of criminal defendants.
- [Michael Pressman and Michael Shammas, Memorandum: The Permissibility & Constitutionality of Jury Trial by Videoconference \(May 4, 2020\)](#). This memorandum discusses whether it is constitutionally permissible for federal and state courts to conduct jury trials remotely, through a videoconference.

D. Law Review Articles

- [Will Resnik, Get with the Times: Why the Use of Live Two-Way Video Testimony Does Not Violate The Confrontation Clause, 45 Am. J. Crim. L. 461 \(2019\)](#). The author proposes that live two-way video testimony does not violate a defendant's confrontation rights under the test set forth in *Maryland v. Craig*.
- [Anthony Garofano, Avoiding Virtual Justice: Video-Teleconference Testimony in Federal Criminal Trials, 56 Catholic University L. Rev. 683 \(2007\)](#). This article

discusses the proper test for the use of virtual testimony. The author concludes that the “Craig Test” should be applied, while meeting two major goals: (1) the rule must allow the admission of virtual testimony on a case-by-case basis and find it is necessary to further an important public policy, and (2) the use of virtual testimony should preserve as many elements of actual confrontation as possible. Virtual testimony does not fit perfectly within the Confrontation Clause, but it is a valuable tool for use in trial.

- **Hadley Perry, Virtually Face-to-Face: The Confrontation Clause and the Use of Two-Way Video Testimony, 13 Roger Williams University L. Rev. 565 (2008).** This article discusses why virtual testimony is constitutional under the Sixth Amendment. The author offers reasons for why virtual testimony should be adopted such as efficiency and consistency with constitutional rights.
- **Richard D. Friedman, Remote Testimony, 35 U. Mich. J.L. Reform 695 (2002).** The author discusses the proposed amendment to the Federal Rule of Criminal Procedure 26, which allowed for use of remote, virtual testimony at trial, and the problems that it raised under the Confrontation Clause. The author offers a revised proposal, which better preserves the confrontation rights of defendants.
- **Francis A. Weber, Complying with the Confrontation Clause in the Twenty-First Century: Guidance for Courts and Legislatures Considering Video Conference-Testimony Provisions, 86 Temp. L. Rev. 149 (2013).** The author discusses the role of virtual testimony in trials, and proposes potential solutions to allow for more widespread use of video testimony, while preserving constitutional rights of defendants.

E. Expert Analysis

Law 360 Expert Analysis: Articles in Law360 can be accessed through LexisNexis. These articles provide information on emerging legal issues by experts in the legal community.

- **Steven D. Gordan, CARES Act and The Future of Remote Criminal Proceedings (April 7, 2020).** This article discusses the impact that the new Coronavirus Aid, Relief, and Economic Security (CARES) Act will have on the use of videoconferencing in criminal proceedings.
- **Elisabeth Ross & Christopher Hennessy, How COVID-19 Might Uproot Centuries of Litigation Traditions (April 21, 2020).** This article discusses the potential impact that COVID-19 may have on the future of litigation. The COVID-19 pandemic could potentially bring about new technologies inside and outside of the courtroom, while maintaining constitutional rights and safety of the community.
- **Kate Dyson, Virginia Chavez Romano, & Yanbing Chu, Pandemic Could Shape Video Testimony in Criminal Trials (April 14, 2020).** This article discusses the potential impact that video testimony could have on the future of criminal trials. In order for courts to continue to function efficiently during times of uncertainty, the author suggests changes in federal criminal procedures to allow for virtual and remote testimony.

F. Important Associations and Groups

Both existing and new created associations and task forces constantly provide new information on COVID-19-related legal issues.

- [ABA Coronavirus \(COVID-19\) Task Force.](#)

In light of the numerous legal issues emerging as a result of the COVID-19 pandemic, the American Bar Association created the ABA Coronavirus (COVID-19) Task Force, which is composed of lawyers and judges across the nation. The task force helps to identify emerging

legal issues and make recommendations to address those issues. Their website provides a wide array of practice tools, including links to potential resources and other group's websites.

- [United States Courts – Coronavirus \(COVID-19\) Response and Recovery.](#)

Federal courts are working closely with the CDC and health officials to determine next steps for court operations across the nation. The website compiles links to federal and state court orders, court policies and procedures, and other judicial news.

- [Judicial Council of Georgia: Judicial COVID-19 Task Force.](#)

The Judicial Council of Georgia has a website including links to current COVID-19 news, emergency court orders, and informational tools for courts to use. The Judicial COVID-19 Task Force was created by the Judicial Council of Georgia in an effort to provide information to courts, while assisting courts in conducting remote proceedings and restoring in-court proceedings. The Judicial COVID-19 Task Force of Georgia is made of up judges from around the state, attorneys and other members of the legal profession and the public.

G. Electronic Resources

Searches with common legal research tools, such as LexisNexis and Westlaw return a fair amount of information related to Confrontation Rights. Many of the resources related to virtual and remote testimony as it relates to Confrontation Rights, such as law review articles, legal memoranda and reports, discuss the pros and cons of technological innovation and courts, and how laws and procedures could evolve to make virtual and remote testimony fit within a defendant's constitutional rights. All of the information in this guide was accessed through Lexis, Westlaw, and Google Searches.

- **Databases.** Some common legal research databases have set up COVID-19 specific research centers. The following two research platforms have provided valuable research and information directly related to emerging legal issues related to COVID-19.
 - [Westlaw – Global Coronavirus Toolkit](#)
 - [Bloomberg Law – BLAW In Focus: Coronavirus \(COVID-19\)](#)

H. Helpful Links

- **Coronavirus and the Courts**

The National Center for State Courts created a website tracking different aspects of the COVID-19 pandemic. This website is constantly being update with state to state, and federal resources related to COVID-19.

<https://www.ncsc.org/newsroom/public-health-emergency>

- **Remote Courts Worldwide**

Remote Courts Worldwide is an international website that tracks news and information related to COVID-19 legal issues.

<https://remotecourts.org/country/united-states-of-america.htm>

I. Informational Webinars

Webinars created on emerging legal issues surrounding COVID-19 provide valuable information on what different courts are doing in relation to new restrictions and give different perspectives as to how court operations will continue in light of COVID-19.

- **Managing Juries and Jury Trials During The COVID-19 Pandemic**

<https://vimeo.com/402949803>

- **How State Courts Are Using Innovative Technologies and Responsible Health and Safety Practices To Resume Jury Trials**

<https://vimeo.com/422780495>

- **“COVID-19 and Criminal Adjudication” by Berkeley Law Professor Andrea Roth**
(38:04-42:58)

<https://www.youtube.com/watch?v=CEinKqHbqJ4>