STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Ct. No: 157812

vs

ARTHUR JEMISON,

Defendant-Appellant.

Wayne Circuit No. 15-10216-01
Court of Appeals No. 334024

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF ON APPEAL

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COUNTERSTATEMENT OF JURISDICTION

The People concur with defendant's statement of appellate jurisdiction.

COUNTERSTATEMENT OF QUESTION PRESENTED

I.

A defendant's right to face-to-face confrontation is waived when the prosecution serves notice of its intent to admit lab reports in lieu of testimony pursuant to MCR 6.202, and the defendant fails to file a timely objection. Here, the prosecutor filed notice of her intent to admit Cutler's lab report—which merely summarized the work of other analysts and did not identify defendant as the rapist—and the defense never filed an objection. Was the Confrontation Clause violated where the defendant was never entitled to confront Cutler—face-to-face or otherwise—in the first place?

The trial court answered, "No."

The People answer, "No."

The defendant answers, "Yes."

INTRODUCTION

Defendant waived his right to confront Cutler when his trial counsel failed to object to the prosecutor's MRE 6.202 notice.[1] Michigan's notice-and-demand court rule provides that—when the prosecutor intends to introduce a forensic expert's report instead of their live testimony at trial and gives notice of that intent—the report is admissible as substantive evidence unless the defendant objects in writing within fourteen days. Here, although defendant orally objected to allowing the expert, Derek Cutler, to testify by two-way video, the alternative was that Cutler's report would have come into evidence without Cutler having to testify at all—face-to-face or otherwise. As it was, defendant got to cross-examine Cutler via Skype, which was more than he was entitled to after having waived his right to confront Cutler altogether.

If the issue is not deemed waived, there was still no Confrontation Clause violation. This Court does not have to follow *Maryland v Craig*,[2] as it is factually distinguishable and has never been applied to expert testimony by two-way video in Michigan.[3] If this Court does apply *Craig,* it should be interpreted broadly. This Court should find that it is within a trial court's discretion to allow a neutral, scientific lab witness to testify via two-way video when the cost and inconvenience

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[1]In the People's answer to defendant's application for leave to appeal, the People treated the issue as preserved, because defendant had objected under MCR 6.006, citing confrontation grounds. But upon further research and review, the People have determined that the issue is waived because defendant failed to file a timely objection under MCR 6.202.

[2]*Maryland v Craig*, 497 US 836 (1990).

[3]As discussed *infra*, the Michigan Court of Appeals adopted the *Craig* standard in the context of expert testimony by two-way video in *Michigan v Buie*, 285 Mich App 401 (2009), but the analysis was never applied. After remand, this Court applied the good cause and consent test under MCR 6.006 to find waiver without any analysis under *Craig*. *Michigan v Buie*, 491 Mich 294 (2012).

of the witness's live appearance is great and the witness's evidence is only minimally relevant. This balancing is necessary, in cases such as this, to further Michigan's policy interest in expediting the testing of thousands of abandoned rape kits on behalf of cold-case sexual assault victims. While convenience and cost considerations might not be weighty enough to justify allowing a victim or crucial fact witness testifying via a *one-way* video procedure, a judge could reasonably find that cost-and-convenience justifies remote two-way interaction when the witness is a neutral expert giving "foundational,"[4] cumulative testimony.

In deciding whether to dispense with the face-to-face requirement in favor of remote testimony, courts should balance the impact on the defendant's confrontation right against the government's interest in utilizing remote testimony. In assessing the impact on a defendant, the Court should consider the following factors: (1) the type of witness—a neutral expert witness does not carry the same credibility concerns as a victim or an eyewitness; (2) the degree to which the testimony is contested, including whether it is undisputed, cumulative, or corroborated; and (3) the type of technology being utilized—the capability of two-way video, which allows the parties to see and interact with one another in real time, is not the same as one-way video, telecom, or videotaped deposition testimony because it offers nearly the same confrontation experience as in-court testimony. Thus, in weighing the government's interest in utilizing remote testimony, the Court

[4]Cutler's testimony was "foundational" in nature; that is, it merely established the foundation for other expert witnesses to give their conclusions. Specifically, Cutler merely established that there was male DNA in the victim's rape kit. Maggert, who testified live and in person, verified Cutler's work and ultimately testified to how defendant came to be identified. While Cutler's testimony was necessary to lay a foundation for Maggert's conclusions, his testimony was neutral as opposed to accusatory in nature. Although non-accusatory witnesses are not exempt from confrontation requirements, *Melendez-Diaz v Massachusetts*, 557 US 305, 313 (2009), their testimony does not evoke the same credibility concerns as victim and fact witnesses.

should consider the significance of the interest—whether it involves protecting a vulnerable population such as the infirm or child witnesses, or whether, as here, it involves accommodating an out-of-state expert witness whose testimony is not subject to credibility attacks and who would otherwise be taken away from the important work of testing backlogged rape kits.

The requirement that a defendant's accusers must meet him face-to-face is at the core of Confrontation Clause jurisprudence and goes back to ancient times. In *Coy v Iowa*, Justice Scalia explained that, "It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'"[5] Certainly, in cases such as *Craig*, where the witness is a victim or fact witness and might have a motive to fabricate, demeanor is of paramount importance. With those types of witnesses, the government should be required to show a more significant interest in order to outweigh the defendant's right to literal face-to-face confrontation. But where, as here, the witness has no motive to lie, the witness's testimony is cumulative and corroborated by other evidence, and the technology employed allows for "virtual" face-to-face confrontation, it cannot be an abuse of discretion to find that the scale tips in favor of allowing remote testimony.

Otherwise, the prosecution would be forced to fly DNA analysts from out-of-state for every case, regardless of the nature of their testimony. Creating such a rule would circumvent the Court's rationale in adopting MCR 6.202, which was enacted to lessen the burden on laboratories so that they can focus on doing the actual work of testing evidence. It would also defeat the purpose of having outsourced laboratories perform the analyses in the first place, because it would be cost-prohibitive. Ultimately, creating such a rule would result in serial rapists remaining at large while victims—who already felt as though their cases were forgotten—continue to wait for justice.

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[5] *Coy v Iowa*, 487 US 1012, 1019 (1988).

If this Court nevertheless finds constitutional error, the error should be deemed harmless beyond a reasonable doubt. If Cutler had not been allowed to testify via video, his report would have come into evidence pursuant to MCR 6.202. Cutler's testimony added little, if anything, to the conclusions in his report. He was a neutral, foundational witness. The reliability of his testimony was not in question. Three of the four requirements for confrontation remained intact. When assessing constitutional error, this Court should recognize that the errors are not all equal. The error here is not that Cutler's testimony was admitted. It is that he did not testify face-to-face, in court. This type of error is different from other, more egregious types of confrontation errors, such as the erroneous admission of testimonial hearsay—where *none* of the constitutional safeguards remain in place. It is also less egregious than the admission of testimony—via one-way or two-way video—from a victim or fact witness whose demeanor is critical to assessing credibility.

If there was error in this case, it certainly did not impact the outcome of defendant's trial. The Court of Appeals should be affirmed.

COUNTERSTATEMENT OF FACTS

Defendant was charged with two counts of first-degree criminal sexual conduct.[6] Before trial, the prosecutor filed a notice under MCR 6.202, which permits the admission of laboratory reports in lieu of live witness testimony. Under the court rule, unless the opposing party files a written objection to the notice within fourteen days of receipt, the reports are "admissible in evidence to the same effect as if the person who performed the analysis or examination had personally testified."[7] Defendant's trial counsel did not file a written objection pursuant to the rule. 102a, 555a.

At a pretrial motion hearing on May 20, 2016, the trial court addressed the notice filed by the prosecution regarding the use of laboratory reports in lieu of testimony. The prosecutor informed the court that she was seeking to admit the reports of two DNA analysts, Derek Cutler and Joshua Strong, pursuant to the notice.[8] She was also seeking to have one expert, Catherine Maggert, offer live testimony explaining her conclusions regarding the two reports as well as her conclusions regarding her own report. 101a-109a. At the hearing, despite not having filed a written objection pursuant to MCR 6.006, the defense objected to the prosecutor being allowed to admit the lab reports in lieu of testimony, citing MRE 703.[9] Judge Antonio Viviano ruled that the reports could be admitted without expert testimony. 106a.

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[6]MCL 750.520b.

[7]MCR 6.202.

[8]Prosecutor's MCR 6.202 notice (88a-95a).

[9]MRE 703 provides: "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible."

The prosecutor then sought another pre-trial ruling to admit the testimony of a DNA expert, Derek Cutler, via two-way video conferencing. Cutler had not been endorsed by the prosecution, and his report was one of those that the judge ruled would be admitted in lieu of testimony under MCR 6.202. 101a, 109a. The prosecutor informed the court that, "if his testimony becomes necessary" she could have him available by video. The defense objected on confrontation grounds. 109a. Judge Viviano ruled that Cutler could testify via video conferencing. 110a. Lastly, the prosecution sought to add an additional chain and custody witness, David Dehem, to her witness list. There was no objection by the defense, and Judge Viviano allowed the addition of the witness. 110a-111a.

Judge Lawrence Talon presided over defendant's trial. At trial, the victim, Talisha Sams Dowe, testified that on September 14, 1996, she was working as a dancer when she encountered a man by the name of Delano. She knew of him from the neighborhood. 373a-374a. He asked her for a dance, and she danced for him. After the dance, Delano asked the victim if she wanted to go out for breakfast and she said yes. They left the club together. 376a. Instead of going out to eat, they ended up changing plans and going to Delano's cousin's house, where they had consensual intercourse. 377a. Afterwards, the victim asked Delano to take her home. He said he had to make a stop first. He drove to a street called Weyher in the city of Detroit. 379a.

Delano left the car running on Weyher Street while he got out and went into a house. He was gone for approximately thirty minutes, while the victim waited in the car. 380a. Eventually, Delano came out and got back in the car. He drove to a house at the end of the block and again left the car running while he went into the house. 381a. The victim was still waiting in the car when she observed a man walking through the alley that drew her attention. The man was wearing a baseball

cap, tan jacket, striped shirt, and light colored blue jeans. The man walked in front of the car and touched the car with his finger. Then, he opened the driver's side door, got in, and put a gun between the victim's legs. He threatened to shoot her and demanded her money. 384a-385a.

The man proceeded to put the car in drive and he drove to Belvedere Street. There, he pulled over and forced the victim to perform fellatio followed by vaginal intercourse. 387a-392a. The gun was still in his hand. 389a. After she was raped, the victim handed over her jewelry and money. 392a-393a. She was then able to get dressed and exit the vehicle. All the while, the man was still holding the gun in his hand. The victim walked to her friend Ebony's house. While she was there, she got into a fight with two of Ebony's friends and ended up with a black eye. Eventually, the victim went to the home she shared with her grandmother. 394a-399a. When she got home, she rinsed her mouth out with peroxide and took a shower. 399a. Her sister came over and they took a cab to the police department. 401a. The police took the victim to the hospital. 402a. The victim told police that her black eye was caused by the rapist during the assault, which was not true. 406a; 657a. She did not tell police that she was forced to perform fellatio. 657a.

A rape kit was performed at Detroit Receiving Hospital on September 14, 1996. 342a, 350a-355a, 403a-404a. In 2015, the victim was contacted by Detective Mike Sabo about her unsolved rape case. 413a-414a. Detective Sabo told her that her rape kit had been tested and asked her to look at some pictures. The victim was not able to identify defendant when his photo was shown in a photographic lineup, but when she was shown a single photo of defendant, she was able to identify him as her niece's uncle. Coincidentally, the victim had met defendant in the year 2000—without recognizing him as the rapist—because her sister had two children with defendant's brother. The victim met defendant because of the relationship between his brother and her sister. The victim saw

defendant "a few times" in the year 2000. She did not know him when he raped her in 1996. The victim also identified defendant in the courtroom, as her nieces's uncle, not as the rapist. 415a-420a, 424a, 469a-470a, 533a, 535a, 737a-738a.

Maggert testified that she was employed as a DNA analyst with the Michigan State Police Crime Lab in Northville, Michigan. 585a. She was qualified as an expert in serology, forensic biology, and DNA analysis. 594a. She proceeded to testify to a report authored by Derek Cutler, a forensic DNA analyst at Sorenson Forensics in Utah.[10] 606a. Her role with this particular report was to conduct a technical review of the male DNA profile that had been developed, and to enter the sample into the CODIS database. 607a-615a. Maggert also testified to a report authored by Joshua Strong from the Michigan State Police CODIS Unit. The report identified defendant as a suspect based on the DNA profile that Maggert had entered into CODIS. 617a-618a. Lastly, Maggert testified that she obtained a known buccal swab from defendant and submitted it for DNA testing. Forensic Scientist Erica Caster developed a DNA profile from the buccal swab, and Maggert compared it to the profile that had been developed by Sorenson Forensics. Maggert concluded that defendant's DNA was present on the victim's vaginal swab and genital gauze samples. Maggert then placed her findings in a report. 622a-642a.

The prosecution then proceeded to call Derek Cutler via video conferencing pursuant to Judge Viviano's order, so that he could testify consistent with his report, to his review of other analysts' work and his conclusion that a male DNA profile was developed from the victim's rape

[10]Maggert explained that over eleven thousand rape kits had been discovered in the city of Detroit and that the Michigan State Police had obtained a federal grant to be able to send out the kits for testing at private laboratories. She explained, "[W]e needed to find a way to get [the] kits processed and to do eleven thousand kits would absolutely drown us out at the laboratory." (600a).

kit. The defense again placed an objection on the record. Judge Talon overruled the objection, noting for the record that he could not overrule Judge Viviano: "If I was deciding this I would not allow the testimony in, but Judge Viviano has already decided and I can't overrule him." 700a-704a, 718a, 721a-725a.

Cutler testified that he was employed as a forensic DNA analyst at Sorenson Forensics in Salt Lake City, Utah. 707a. Cutler was qualified as an expert in DNA analysis over defense counsel's objection. 715a. Cutler acknowledged that he did not "actually see" the victim's rape kit. Rather, his practice was to "go off of the notes that are done by other serologists or technicians who are competent in their testing." 718a. Cutler stated, "When I have a case that I'm to interpret and offer conclusions on I must review all previous work done and make sure that it was done according to our standard protocols and everything is complete according to our contract requirements." 721a. The defense objected to Cutler's testimony on MRE 703 and hearsay grounds. The defense argued that, under MRE 703, whatever information that an expert bases his opinion on must be admitted into evidence. Further, the defense argued, "What someone else told him is hearsay." 718a.

Cutler proceeded to testify regarding the report that he had generated and the male DNA profile that was developed from the vaginal swabs and genital gauze samples in the victim's rape kit.[11] 722a-725a. Cutler concluded that there was a mixture of at least two contributors to the epithelial fraction of the vaginal swabs. A major profile was identified and it matched the reference sample that was provided by the victim. A minor portion was unable to be analyzed due to insufficient levels of DNA present. As for the sperm fraction of the vaginal swabs, a mixture from

[11]Cutler acknowledged that the extraction of DNA from the victim's vaginal swabs and genital gauze samples was performed by another forensic analyst, Derek Kettle. Kettle did not testify at defendant's trial. (729a).

at least two contributors was also obtained. A major male DNA profile was identified within the sperm fraction. A minor DNA profile was unable to be analyzed due to insufficient levels of DNA present. 723a.

Cutler also made conclusions regarding a genital gauze sample from the victim's rape kit. The sperm fraction from the genital gauze sample contained a mixture of DNA profiles from at least two contributors. A major male DNA profile was identified within the sperm fraction. The profile matched the male DNA that was identified in the victim's vaginal swabs. There was also a minor profile that was deemed inconclusive due to low levels of DNA present. 724a. During cross-examination, defendant's trial counsel asked Cutler, "So the only thing you can do is report the presence of the DNA that's present? You're not giving any conclusions as to how it got there, correct?" Cutler replied, "Correct." 728a. Trial counsel's entire cross-examination of Cutler occupied three pages of the trial transcript.[12] 727a-730a.

Defendant did not testify at trial. Trial counsel argued in closing that the rapist's DNA could have been contained in the minor profile that was insufficient to be analyzed. 795a-796a, 798a-799a. Trial counsel seemed to be arguing that defendant had engaged in consensual intercourse with the victim at some point immediately prior to the rape. In his opening statement, counsel had stated: "He had consensual sex with her, but he wasn't the person who raped her and Miss Sams Dowe who was lap dancing at the motorcycle club is not telling you everything that happened that night."[13] 325a. Similarly, in closing, counsel acknowledged that defendant's DNA was present in the victim's

[12]The defense did also ask questions pertaining to Cutler's expert qualifications during voir dire, and objected to him being qualified as an expert. (712a-715a).

[13]There was no evidence admitted at trial regarding a consensual sexual act between the victim and defendant.

rape kit, but he argued to the jury that defendant was not the rapist. He again implied that the act may have been consensual, by telling the jury that the victim had been "giving lap dances to strangers" and probably did not "know every person that she took a date from." 797a-799a.

Defendant was convicted of one count of first-degree criminal sexual conduct. 850a. He was sentenced to twenty-two to forty years imprisonment. 885a.

Defendant appealed his conviction to the Court of Appeals, and on April 12, 2018, Judges Sawyer, Hoekstra, and Murray unanimously affirmed his conviction.[14] Judge Murray wrote separately but concurred with the majority.[15] Defendant filed an application for leave to appeal before this Court. In an Order dated January 16, 2019, this Court granted defendant's application and asked the parties to address whether permitting an expert to testify by two-way interactive video, over defendant's objection, constituted a denial of defendant's constitutional right to confrontation; and, if so, whether the error was harmless.[16]

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[14] *Michigan v Jemison*, unpublished majority opinion, COA #334024 (April 12, 2018) (889a-895a).

[15] *Michigan v Jemison,* unpublished concurring opinion, COA #334024 (April 12, 2018) (896a-897a).

[16] *Michigan v Jemison*, 503 Mich 936 (2019).

ARGUMENT

I.

A defendant's right to face-to-face confrontation is waived when the prosecution serves notice of intent to admit lab reports in lieu of testimony pursuant to MCR 6.202, and the defendant fails to file a timely objection. Here, the prosecutor filed notice of her intent to admit Cutler's lab report—which merely summarized the work of other analysts and did not identify defendant as the rapist—and the defense never filed an objection. There can be no Confrontation Clause violation where the defendant was never entitled to confront Cutler—face-to-face or otherwise—in the first place.

Standard of Review

Waiver is the "intentional relinquishment or abandonment of a known right."[17] "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error."[18] Defendant has waived appellate review of this issue by failing to object to the admission of the lab report under MCR 6.202.

If the issue is not deemed waived, and this Court considers it preserved, then *de novo* review applies.[19] Harmless error analysis applies to Confrontation Clause errors.[20] If—after conducting a "thorough examination of the record"—a reviewing court is able to "conclude beyond a reasonable

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[17] *United States v Olano*, 507 US 725, 733 (1993), quoting *Johnson v Zerbst*, 304 US 458, 464 (1938); see also *Michigan v Buie*, 491 Mich 294, 305 (2012).

[18] *Michigan v Carter*, 462 Mich 206, 215 (2000), quoting *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996), citing *Olano, supra*, at 733-734.

[19] *Michigan v Benton*, 294 Mich App 191, 195 (2011).

[20] *Michigan v Shepherd*, 472 Mich 343, 348 (2005).

doubt that the jury verdict would have been the same absent the error," then the error is said to be harmless.[21]

Discussion

A. Defendant has waived appellate review of this issue.

Defendant waived his right to confront Cutler when his trial counsel failed to file a written objection to the prosecution's MCR 6.202 notice. A defendant's right to confrontation, like other fundamental constitutional rights, can be waived. While some constitutional rights require a personal waiver by the defendant, the right to confrontation is not one of them. "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake."[22] This Court, in *Michigan v Carter*, recognized that there are some fundamental constitutional rights in which "waiver may be effected by action of counsel."[23]

In *Melendez-Diaz v Massachusetts*, the United States Supreme Court identified confrontation as one such right: "The right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of

[21] *Neder v United States*, 527 US 1, 19 (1999).

[22] *Olano, supra,* at 733.

[23] *Michigan v Carter*, 462 Mich 206, 218 (2000).

such objections."[24] This principle was affirmed by this Court in *Michigan v Buie*: "There is no doubt that the right of confrontation may be waived and that waiver may be accomplished by counsel."[25]

On November 30, 2015, the prosecutor filed a notice of intent to admit Cutler's lab report in lieu of testimony pursuant to MCR 6.202.[26] Although defendant's trial counsel objected to the admission of Cutler's testimony under MCR 6.006, which allows video testimony only where both parties consent, he had already waived defendant's right to confront Cutler by failing to file a timely objection to the prosecutor's MCR 6.202 notice. MCR 6.202 governs the disclosure and admissibility of forensic laboratory reports. The rule specifically applies to criminal trials,[27] and states that, upon receiving a forensic laboratory report and certificate, the prosecutor must serve a copy of the report and certificate upon the opposing party's attorney within fourteen days. If the prosecutor seeks to admit the report at trial, written notice must be provided to the opposing party.[28] Unless the opposing party files a written objection under subsection (C)(2) of the rule, "the report and certification, if applicable, is admissible in evidence to the same effect as if the person who performed the analysis or examination had personally testified."[29]

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[24] *Melendez-Diaz v Massachusetts*, 557 US 305, 313 n 3 (2009).

[25] *Michigan v Buie*, 491 Mich 294, 306-307 (2012), citing *Melendez-Diaz*, *supra.*

[26] 88a-95a.

[27] MCR 6.202(A).

[28] MCR 6.202(C)(1).

[29] MCR 6.202(C)(2).

If the opposing party wants to "demand" that the witness appear in person, the rule states that they must file a written objection within fourteen days of receiving the notice.[30] If a written objection is filed within the fourteen days, then the analyst would be required to testify.[31] The rule sets forth the certification requirements in subsection (D):

> Except as otherwise provided, the analyst who conducts the analysis on the forensic sample and signs the report shall complete a certificate on which the analyst shall state (I) that he or she is qualified by education, training, and experience to perform the analysis, (ii) the name and location of the laboratory where the analysis was performed, (iii) that performing the analysis is part of his or her regular duties, and (iv) that the tests were performed under industry-approved procedures or standards and the report accurately reflects the analyst's findings and opinions regarding the results of those tests or analysis. A report submitted by an analyst who is employed by a laboratory that is accredited by a national or international accreditation entity that substantially meets the certification requirements described above may provide proof of the laboratory's accreditation certificate in lieu of a separate certificate.[32]

Here, the prosecutor filed proper notice of her intent to introduce Cutler's lab report in lieu of testimony and defendant's trial counsel did not file a written objection pursuant to the rule. 102a; 555a.

MCR 6.202 is Michigan's version of a "notice-and-demand" procedure and was adopted in 2013. Defendant cites *Melendez-Diaz v Massachusetts* for its holding that expert witnesses are not exempt from the requirements of the Confrontation Clause.[33] But the Court in *Melendez-Diaz* also

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[30]MCR 6.202(C).

[31]MCR 6.202.

[32]MCR 6.202(D).

[33]*Melendez-Diaz v Massachusetts*, 557 US 305, 313-325 (2009). In *Melendez-Diaz*, the United States Supreme Court considered whether affidavits prepared by forensic analysts identifying a substance connected to the defendant as cocaine were "testimonial" statements that would render the analysts "witnesses" subject to confrontation under the Sixth Amendment. The affidavits met the statutory requirements for admission under a Massachusetts law that allowed

specifically addressed the constitutionality of notice-and-demand statutes and deemed them to be constitutional on confrontation clause grounds, at least in their "simplest form." Justice Scalia, writing for the majority, did not go so far as to say that *every* state's notice-and-demand procedures are constitutional, but condoned those statutes that were "simple" in form: "In their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial."[34]

While *Melendez-Diaz* did not specifically endorse Michigan's notice-and-demand procedure, which was adopted after the Court's decision, the Court did give three examples of other states' notice-and-demand statutes that it deemed to be simple in form and thus constitutional. The Court specifically endorsed the notice-and-demand statutes employed by Georgia, Ohio, and Texas: "See, e.g., Ga.Code Ann. § 35–3–154.1 (2006); Tex.Code Crim. Proc. Ann., Art. 38.41, § 4 (Vernon 2005); Ohio Rev.Code Ann. § 2925.51(C) (West 2006)." These statutes, according to the majority, "shift no burden whatever." *Id* at 325-327. Writing for the majority, Justice Scalia noted that, while the Confrontation Clause may not be disregarded for convenience sake, "many states permit the defendant to assert (or forfeit by silence) his Confrontation Clause right after receiving notice of the prosecution's intent to use a forensic analyst's report." And, "[d]espite these widespread practices,

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them to be admitted without witness testimony. The United States Supreme Court held that expert testimony is not exempt from the Confrontation Clause, despite the fact that experts are neutral and scientific, non-accusatory, and unconventional witnesses.

[34] *Id* at 326.

there is no evidence that the criminal justice system has ground to a halt in the States that, one way or another, empower a defendant to insist upon the analyst's appearance at trial."[35] The *Melendez-Diaz* opinion emphasizes that its holding "will not disrupt criminal prosecutions in the many large States whose practice is already in accord with the Confrontation Clause."[36]

Contrary to the dissent's suggestion in *Melendez-Diaz*, requiring a defendant to assert his right to confrontation ahead of trial does not shift the burden of proof to the defendant. "The defendant always has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the time within which he must do so."[37] The Court likened notice-and-demand procedures to alibi notice rules that require the defendant to give notice of his intent to present alibi witnesses before trial: "There is no conceivable reason why [defendants] cannot similarly be compelled to exercise [their] Confrontation Clause rights before trial."[38]

After *Melendez-Diaz*, several states have analyzed their own notice-and-demand procedures in light of the decision's impact on Confrontation Clause jurisprudence. Whether or not the statutes have been upheld has largely hinged upon whether they are deemed to be "burden-shifting" or "simple" in nature. The statutes that the majority endorsed as "simple"—those of Georgia, Ohio, and Texas—are similar in that they all require that the prosecutor provide the defendant with a copy

[35] *Id* at 325-326.

[36] *Id* at 326.

[37] *Id* at 326-327.

[38] *Id* at 327.

of the analyst's report prior to trial.[39] All three statutes also require the defendant to file an objection to the admission of the report within a certain period of time.[40] And all of the statutes require that the notice contain some form of certification to ensure that the analyst is qualified.[41]

In *Louisiana v Beauchamp*, a Louisiana Court of Appeals case, the State filed a notice of intent to introduce a scientific analysis report at trial in accordance with Louisiana's statutory notice-and-demand procedure. The defendant failed to request the issuance of a subpoena for the appearance of the analyst, as required by statutory procedure, but nevertheless raised an objection at trial citing his confrontation right.[42] In *Beauchamp*, as in the instant case, the State informed the

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[39]Georgia requires service of the report "prior to the first proceeding in which the report is to be used against the defendant." Ga Code Ann § 35–3–154.1 (2006). Ohio requires the report to be served "prior to any proceeding in which the report is to be used against the accused other than at a preliminary hearing or grand jury proceeding where the report may be used without having been previously served upon the accused." Ohio Rev Code Ann § 2925.51(C) (West 2006). Texas requires the report to be served twenty days prior to trial. Tex Code Crim Proc Ann, Art 38.41, § 4 (Vernon 2005).

[40]Georgia and Texas require the defendant to object in writing ten days prior to trial. Ga Code Ann § 35–3–154.1 (2006); Tex Code Crim Proc Ann, Art 38.41, § 4 (Vernon 2005). Ohio requires the defendant to "demand" the appearance of the live witness within seven days after receiving the report, by the means designated in the notice. Ohio Rev Code Ann § 2925.51(C).

[41]Georgia requires that the report include an affidavit of the analyst stating his or her experience, that he or she is certified to perform the analysis, and that the testing procedures used were "approved by the bureau." Ga Code Ann § 35–3–154.1 (2006). Texas requires that the report to contain a statement describing the analyst's "educational background, training, and experience," attesting that the "laboratory employing the analyst is accredited," and that the tests or procedures used were reliable." Tex Code Crim Proc Ann, Art 38.41, § 4 (Vernon 2005). Ohio requires that the report contain a notarized statement by the analyst setting forth their "education, training, and experience" and attesting that the procedures used were "scientifically accepted" and that "the evidence was handled in accordance with established and accepted procedures while in the custody of the laboratory." Ohio Rev Code Ann § 2925.51(C).

[42]*Louisiana v Beauchamp*, 49 So 3d 5, 7-8 (2010).

trial court that the defendant had not filed an objection as required by procedural rule, and the state court admitted the report over the defense objection.[43]

On appeal, the defendant argued that the admission of the report violated *Melendez-Diaz*. The Louisiana Court of Appeals held that the Louisiana statute, which merely required the defendant to exercise his confrontation rights prior to trial by requesting the issuance of a subpoena, was "precisely the kind of 'notice-and-demand' statute that the court in *Melendez–Diaz* recognized to be permissible under the Confrontation Clause."[44] It was not burden-shifting, because, if the defendant had made a timely assertion of his rights under the statute, "the certificate would not have been admissible into evidence in lieu of [live] testimony. It would have been incumbent upon the State to procure the attendance of the person making the certificate at trial and to offer that testimony to establish the results of the examination."[45]

Likewise, the "simple" statutes favored by *Melendez-Diaz* do not impose requirements that place the burden on the defendant. Unlike Georgia, Ohio, and Texas, some states impose more onerous requirements on defendants who wish to demand the analyst's presence in court, such as

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[43] *Id* at 9.

[44] *Id* at 8-10; see also, *Louisiana v Dukes*, 57 So 3d 489, 496 (2011) (Louisiana statute requiring defendant to request the issuance of a subpoena for analyst was not burdensome, where "the mere request for a subpoena by the defendant five days prior to trial rendered the certificate useless to the state as prima facie proof of its contents or of proper custody. La. R.S. 15:501(B)(1). Accordingly, an unavailable or uncooperative analyst becomes the state's problem in meeting its burden of proof and not the defendant's in exercising his right to confrontation."); *Louisiana v Simmons*, 78 So 3d 743, 747 (2012) (Defendant waived his confrontation right by failing to timely request a subpoena for analyst pursuant to Louisiana notice-and-demand statute).

[45] *Beauchamp, supra,* at 10.

"requiring defense counsel to subpoena the analyst, to show good cause for demanding the analyst's presence, or even to affirm under oath an intent to cross-examine the analyst."[46] The *Melendez-Diaz* majority declined to comment on the constitutionality of such requirements, leaving the question of their continuing validity for another day.[47] But after *Melendez-Diaz*, a number of states have struck down statutes that impose those types of burdens.[48]

Michigan's notice-and-demand procedure fits into the "simple" category and not the unduly burdensome category. It requires that the prosecutor provide the defendant with a certified copy of the analyst's report, and written notice of the intent to admit the report at trial. It allows the defendant to file a written objection within fourteen days of receipt of the notice. If the defendant files a timely written objection pursuant to the rule, the report and certificate are *not admissible in lieu of live testimony*. The rule does not require the defendant to state any grounds for the objection, nor does it require the defendant to actually cross-examine the analyst at trial. The defendant does not have to issue a subpoena for the analyst or call the analyst as an adverse witness. Michigan's rule is plainly of the simple variety that was deemed constitutional in *Melendez-Diaz*.

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[46] *Melendez-Diaz, supra,* at 355.

[47] *Id* at 327, n 12.

[48] See *Cypress v Virginia*, 280 Va 305, 317-320 (2010) (Virginia struck down a statute that required the defendant to assert his confrontation right by calling forensic analysts as adverse witnesses, but found the error to be harmless); *Kansas v Laturner*, 289 Kan 727, 751-753 (2009) (Kansas severed the portion of a state statute that required the defendant to state grounds for objection that would indicate an intent to contest the laboratory report at trial); *Reno v Howard*, 130 Nev 110, 115-116 (2014) (Nevada struck down a state statute that required a defendant to establish a substantial and bona fide dispute regarding the facts in the declaration in order to exercise his confrontation rights).

Defendant's trial counsel objected to video testimony at trial, but it was too late.[49] The fact that defendant objected at trial, long after the time had passed to assert his rights under MCR 6.202, does not change the analysis from waiver to forfeiture. *Melendez-Diaz* makes it clear that it is the failure to object *within the time required* by the notice-and-demand procedure which triggers the waiver to occur.

In *Maine v Jones*, as in the instant case, the defendant failed to assert her right to confrontation pursuant to Maine's notice-and-demand procedure. At trial, when the prosecutor sought to admit a forensic chemist's report in lieu of live testimony, pursuant to the notice she had filed, the defendant objected to its admission. The trial court admitted the report over the defendant's objection, because the defendant had failed to request the live presence of the witness within the time set forth in Maine's notice-and-demand statute. The Supreme Court of Maine applied waiver analysis despite the defendant's objection at trial, and held that the defendant had waived her confrontation right: "Jones's failure to timely demand a live witness pursuant to section 1112 effected a voluntary, knowing, and intentional waiver of her known Confrontation Clause rights, and the court therefore did not err by allowing the State to introduce at trial the chemist's certificate in lieu of live testimony."[50]

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[49]It is unclear why defendant's counsel did not object to the prosecutor's MCR 6.202 notice, which would have allowed Cutler's report to come in *without any testimony at all,* but then objected to Cutler testifying by video. At first glance, one might assume that counsel was hoping to have the report entered without any testimony at all, hence the objection to video testimony. But upon reviewing the transcript, the only reason the prosecutor offered to have the witness testify via video was because the defense did not want to waive his testimony. The prosecutor, relying on defendant's lack of objection under MCR 6.202, was not even planning to call Cutler and did not endorse him. (109a).

[50]*Maine v Jones*, 178 A 3d 481, 483-490 (2018).

Colorado, North Carolina, Washington, and Louisiana have also applied waiver analysis in this circumstance. For example, in *Cropper v Colorado*, the Colorado Supreme Court found waiver where the defendant had failed to demand the presence of a forensic technician pursuant to Colorado's notice-and-demand procedure, despite the fact that the defendant had raised an objection at trial.[51]

Assuming that Cutler was a "witness" whom defendant was entitled to confront, defendant should have filed an objection to the prosecutor's notice. If defendant had done so, he would have been entitled to confront Cutler—face-to-face—despite the fact that Cutler's conclusions were not in dispute, that he was merely testifying to the work of other analysts, and that he could make no conclusions about how the male DNA got into the victim's rape kit or *whose DNA it was*.[52] Defendant's failure to follow Michigan's notice-and-demand procedure, which required only that he file a written objection within fourteen days, resulted in a waiver of his right to confront Cutler—

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[51] *Cropper v Colorado*, 251 3 Pd 434, 435-438 (2011); see also *North Carolina v Whittington*, 367 NC 186, 192 (2014) ("When the State satisfies the requirements of subdivision 90–95(g)(1) and the defendant fails to file a timely written objection, a valid waiver of the defendant's constitutional right to confront the analyst occurs"); *Colorado v Martinez*, 254 P 3d 1198, 1199-1202 (2011) (applied waiver analysis where the defendant failed to timely object to the admission of lab reports pursuant to Colorado's notice-and-demand procedure, but later objected at trial); *Washington v Schroeder*, 164 Wash App 164, 166-169 (2011) (applied waiver analysis when the defendant failed to demand live witness testimony pursuant to a Washington court rule governing notice-and-demand requirements for the admission of lab reports); *Louisiana v Cavalier*, 171 So 3d 1117, 1124, 1125 (2015) (Louisiana applied waiver analysis where the defendant's demand for live testimony was premature, because the prosecutor had not yet filed notice).

[52] Justice Kennedy, writing for the dissent in *Melendez-Diaz*, said that in cases such as this, where "the defendant does not even dispute the accuracy of the analyst's work, confrontation adds nothing." Indeed, Kennedy noted, prior to *Crawford*, all Federal Courts of Appeals and 24 state courts were in agreement that the Sixth Amendment does not require analysts to testify. *Melendez-Diaz, supra*, at 340, 349-350. (Kennedy, A.; Roberts, J.; Breyer, S.; and Alito, S., dissenting).

face-to-face or otherwise. Defendant's untimely objection under MCR 6.006 does not change this result. This issue should be deemed waived.

B. If the issue is not deemed waived, there was still no Confrontation Clause violation.

Defendant's confrontation rights were not violated when Cutler testified via two-way video, because defendant and Cutler were able to see each other in real time, defendant was able to cross-examine Cutler, and Cutler's credibility was not at issue. A defendant's right to be confronted by the witnesses against him is embodied in the United States and Michigan constitutions.[53] The United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him...." This right has been incorporated to the states under the Fourteenth Amendment.[54] The language in the Michigan Constitution is nearly identical: "In every criminal prosecution, the accused shall have the right... to be confronted with the witnesses against him or her...."[55] "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."[56]

The Confrontation Clause prohibits the introduction of out-of-court testimonial statements unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination.[57]

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[53] US Const, Am VI; Const 1963, Art 1, § 20.

[54] *Michigan v Fackelman*, 489 Mich 515, 574-575 (2011), quoting *Pointer v Texas*, 380 US 400, 406 (1965).

[55] Const 1963, Art 1, § 20

[56] *Craig*, *supra*, at 845.

[57] *Crawford v. Washington*, 541 US 36, 1374 (2004).

Testimonial statements include "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[58] A statement is testimonial for purposes of the Confrontation Clause if the "primary purpose" of the statement or the questioning that elicits it "is to establish or prove past events potentially relevant to later criminal prosecution."[59] Forensic laboratory reports created to be used as evidence in a criminal proceeding fall within the "core class of testimonial statements" covered by the Confrontation Clause.[60]

The Confrontation Clause consists of four requirements:

> (1) a face-to-face meeting of the defendant and the witnesses against him at trial; (2) the witnesses should be competent to testify and their testimony is to be given under oath or affirmation, thereby impressing upon them the seriousness of the matter; (3) the witnesses are subject to cross-examination; and (4) the trier of fact is afforded the opportunity to observe the witnesses' demeanor.[61]

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[58] *Id* at 52 (internal quotation and citation omitted).

[59] *Davis v Washington*, 547 US 813, 822 (2006).

[60] *Melendez-Diaz*, *supra*, at 310, quoting *Crawford, supra*, at 51-52. See also, *Bullcoming v New Mexico*, 564 US 647, 657-666 (2011) (holding that forensic analyst's report containing defendant's blood alcohol content was testimonial and required the certifying analyst to testify). However, there is also an argument to be made that, under *Williams v Illinois*, 567 US 50, 56-85 (2012), Cutler's report was nontestimonial because it was prepared before defendant had been identified. The plurality in *Williams* noted that *Melendez-Diaz* and *Bullcoming* "did not hold that all forensic reports fall into the same category" for purposes of confrontation. In *Williams*, as in the instant case, the declaration at issue was from an outsourced laboratory and contained information about male DNA profile belonging to a not-yet-identified donor. It was offered not for its truth, but as the underlying basis for the testifying analyst's conclusion that the profile matched the defendant's DNA. As a plurality opinion, *Williams* is not binding precedent, but it is persuasive. While there was no majority consensus as to the rationale, five justices agreed that there was no confrontation violation.

[61] *Michigan v Pesquera*, 244 Mich App 305, 309 (2001), *Craig*, *supra*, at 846, 851.

The face-to-face requirement compels witnesses to "stand face-to-face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."[62] Of course, face-to-face testimony is preferable, but it is not indispensable. Rather, according to the United States Supreme Court in *Maryland v Craig*, it "must occasionally give way to considerations of public policy and the necessities of the case."[63]

In *Maryland v Craig*, the United States Supreme Court recognized that "the face-to-face confrontation requirement is not absolute." The Court then set out to determine under what circumstances the requirement could be dispensed with and replaced with video testimony. The Court held that, absent physical face-to-face testimony, two requirements must be met in order to satisfy the Confrontation Clause. First, the denial of face-to-face confrontation must be "necessary to further an important public policy." Second, the reliability of the testimony must be otherwise assured.[64] The trial court is required to "make case-specific findings that the [video] procedure is necessary to further a public policy or state interest important enough to outweigh the defendant's

[62] *Mattox v United States*, 156 US 237, 242-243 (1895) (superseded on other grounds).

[63] *Craig, supra,* at 849-850, quoting *Mattox*, *supra*, at 243.

[64] *Craig*, *supra*, at 850.

constitutional right of confrontation and that it preserves all the other elements of the Confrontation Clause."[65] The continuing vitality of Craig is uncertain in light of *Crawford.*[66] But *Crawford* did not overrule *Craig*.

Craig involved one-way video testimony from a child witness in a child-abuse case. The United States Supreme Court justified the procedure by finding that Maryland's interest in protecting child witnesses from the trauma of testifying was a necessary public policy interest.[67] The Supreme Court has never addressed whether *Craig* would apply outside of the realm of child trauma cases. But several states and federal circuits have extended *Craig*'s holding to allow remote testimony for adult witnesses, and for public policy reasons that go beyond trauma. For example, courts have allowed remote testimony under *Craig* for reasons such as illness, physical or medical limitations to travel, and—in at least one instance—to lessen the burden and expense of travel for an expert witness living out of state by allowing him to testify via Skype.[68] The Second Circuit in *United States v Gigante* went even farther and declined to apply *Craig* altogether in a case involving two-

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[65]*Id* at 851-852.

[66]*United States v Carter,* 907 F3d 1199, 1206 n 3 (2018). *Craig's* analysis relied heavily on *Ohio v Roberts*, 448 US 56 (1980), which allowed for exceptions to the confrontation requirement based on a judicial determination of reliability. *Roberts* has since been abrogated by *Crawford*, *supra*, on the grounds that confrontation is the only constitutionally prescribed means of assessing reliability of out-of-court testimonial statements. Further, under *Crawford*, testimony of an unavailable witness can be admitted without any application of *Craig*, as long as there was prior opportunity for cross-examination. *Crawford, supra*, at 53-54, 68.

[67]*Craig, supra,* at 836-837.

[68]See *Missoula v Duane*, 380 Mont 290, 291-296 (2015).

way video testimony—instead applying a less stringent "exceptional circumstances" test—despite the fact that the witness was "crucial."[69]

There is no question that two-way video technology more closely resembles face-to-face confrontation than one-way video technology, as it allows the defendant to view the witness's demeanor, during the trial, in real time. Two-way video preserves all of the requirements for confrontation except the literal face-to-face requirement. Yet most states and federal circuits that have addressed one-way versus two-way video—other than the Second Circuit—have determined that they should be treated the same under *Craig*.[70] What is less clear though, is whether they should be treated the same under *Craig*—or whether *Craig* should apply at all—when the witness is a neutral expert[71] giving foundational, cumulative testimony by two-way video. Indeed, that type of

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[69] *United States v Gigante*, 166 F 3d 75 (1999).

[70] See, e.g., *United States v Bordeaux*, 400 F 3d 548, 554 (CA 8, 2005) ("'Confrontation' through a two-way closed-circuit television is not different enough from 'confrontation' via a one-way closed-circuit television to justify different treatment under *Craig*. It is true that a two-way closed-circuit television creates an encounter that more closely approximates a face-to-face confrontation than a one-way closed-circuit television does because a witness can view the defendant with a two-way system. But two-way systems share with one-way systems a trait that by itself justifies the application of *Craig*: the 'confrontations' they create are virtual, and not real in the sense that a face-to-face confrontation is real."); *Carter, supra*, at 1206 ("We now make clear that a defendant's right to physically confront an adverse witness (whether child or adult) cannot be compromised by permitting the witness to testify by video (whether one-way or two-way) unless *Craig*'s standard is satisfied."); *New Mexico v Smith*, 308 P3d 135, 137 (NM Ct App, 2013) (Courts applying *Craig* to video testimony are less concerned with differentiating between one- or two-way video than they are in strictly applying a necessity test to any attempt to supplant live testimony).

[71] The Supreme Court said in *Melendez-Diaz* that neutral, scientific experts are subject to confrontation requirements like any other witness. But *Melendez-Diaz* was concerned with analyst's affidavits being admitted without any testimony at all. And in *Bullcoming* v *New Mexico*, the Supreme Court was concerned with "surrogate" expert testimony—where the results obtained through scientific testing are introduced through an analyst who had neither performed the actual testing nor certified the report. *Melendez-Diaz* and *Bullcoming* did not address

testimony does not evoke any of the reliability or credibility concerns that the Confrontation Clause seeks to protect against.

(1) *Maryland v Craig* is distinguishable.

Videotaped deposition testimony, telephonic testimony, one-way video testimony, and remote testimony involving victim and fact witnesses cannot be compared to expert testimony by two-way video for purposes of constitutional analysis under *Craig* or any other standard. They are not the same. Although the Michigan Court of Appeals adopted the *Craig* standard in the context of an expert witness[72] testifying by two-way video in *Michigan v Buie*,[73] the Court of Appeals never actually applied *Craig*. After the Court of Appeals remanded the case to the trial court to make findings under *Craig*, both parties appealed to this Court. In lieu of granting leave to appeal, this Court ordered the trial court to make findings as to good cause and consent pursuant to MCR 6.006. The trial court found no error in allowing the video testimony, because it found that the defendant had consented to allowing the testimony by video under MCR 6.006. This Court ultimately agreed, and held that the defendant's attorney had waived his right to confrontation under MCR 6.006 by not unequivocally objecting on the record.[74] Thus, although the Court of Appeals said that the *Craig* test applied, they never actually applied it, and this Court has never affirmed that it *should* be applied in the context of an expert witness testifying by two-way video.

"virtual" confrontation.

[72]The expert in *Buie* was a crucial fact witness as opposed to a neutral or foundational witness, as he testified to having examined the sexual assault victims and concluded that their injuries were caused by a sexual assault. *Michigan v Buie*, 285 Mich App 401, 404 (2009).

[73]*Michigan v Buie*, 285 Mich App 401, 415 (2009).

[74]*Michigan v Buie*, 491 Mich 294, 316-318 (2012).

Craig is distinguishable from the instant case, and should be treated as such. In *Craig*, a child witness was allowed to testify via one-way video so that the child was unable to view the defendant while testifying. Here, an adult, who was not a fact witness and had no reason to lie, testified via two-way interactive video so that both parties could see each other while he testified. The two-way interactive video procedure, unlike the one-way procedure utilized in *Craig*, *did* allow defendant to confront Cutler face-to-face. It was just not physically face-to-face in the courtroom.

The United States Supreme Court has never addressed whether the *Craig* test applies to two-way video testimony.[75] While some states and federal circuits have applied the *Craig* test to two-way video testimony of victims and fact witnesses, very few cases have addressed whether the *Craig* test applies to a neutral forensic lab witness or the equivalent testifying by two-way video. For example, among the states holding that the use of remote testimony was not justified by convenience, distance, and economic concerns and the like,[76] only New Mexico and Iowa actually applied the *Craig* analysis to determine the constitutionality of an *expert* witness testifying by *two-way video.*[77] Videotaped deposition testimony, telephonic testimony, one-way video testimony, and remote

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[75]*Iowa v Rogerson*, 855 NW 2d 495, 499 (2014) ("Since deciding *Craig* twenty-four years ago, the Supreme Court has not further examined the constitutionality of remote video testimony...The Court also has not had occasion to consider the constitutionality of new types of video technology available to facilitate remote testimony. *Craig* involved a one-way video system in which the witness could not see or hear the defendant, but the defendant, judge, and jury could see and hear the witness. In contrast, two-way video systems...allow both the defendant and the witness to see and hear one another simultaneously during the testimony.") (internal citation omitted).

[76]In the instant case, the Court of Appeals justified the use of the two-way video procedure, at least in part, because the witness was in Utah (the trial court did not mention distance concerns in its ruling allowing the video testimony).

[77]See 1b-3b.

testimony involving victim and fact witnesses cannot be compared to expert testimony by two-way video for purposes of constitutional analysis under *Craig* or any other standard. They are not the same.

New Mexico and Iowa did apply *Craig* in the context of expert testimony taken by two-way video. In *New Mexico v Smith*, the Court of Appeals of New Mexico applied *Craig* and held that the admission of two-way video testimony of a lab analyst violated the defendant's right to confrontation because "convenience" reasons did not constitute "necessity" under *Craig*. The defendant in *Smith* was charged with operating while intoxicated and the analyst, unlike Cutler, was testifying to the ultimate issue in the case—the defendant's blood results.[78] In *New Mexico v Schwartz*, the Court of Appeals of New Mexico similarly held that mere convenience did not equate to necessity, finding that the two-way video testimony of two forensic scientists violated the defendant's confrontation rights. In *Schwartz*, the forensic scientists' testimony was also not merely foundational—it linked defendant to the deceased victim's body.[79] In *New Mexico v Thomas*, the New Mexico Supreme Court applied *Craig* in the context of a lab analyst testifying by two-way video, and also held that inconvenience was not a sufficient reason to dispense with the defendant's confrontation right. The analyst in *Thomas* was testifying regarding DNA analysis that she had personally performed.[80]

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[78]*New Mexico v Smith*, 308 P3d 135, 136-139 (2013).

[79]*New Mexico v Schwartz*, 327 P3d 1108, 1112-1115 (2014), relying on *Smith*, *supra*, but never expressly mentioning *Craig* or its application.

[80]*New Mexico v Thomas*, 376 P3d 184, 187-196 (2016).

In *Iowa v Rogerson*, the Iowa Supreme Court held that two-way video testimony of lab analysts was not justified under *Craig* where the State cited time constraints and economic considerations. The Court held that such considerations were not sufficient under *Craig*. The witnesses in *Rogerson* did not live out of state.[81] Justice Hecht, in a concurring opinion, expressed her view that deciding the constitutionality of two-way video testimony should be informed by the type of technology available and whether "actual physical presence of a witness in a courtroom produces a sufficiently enhanced opportunity for confrontation when compared to presence achieved through two-way video technology." Hecht said that she would leave open the possibility that in some circumstances, virtual testimony could be constitutionally sufficient: "If technology has evolved to the point where real-time video testimony neither significantly diminishes the fact finders' ability to assess credibility nor lessens accusers' motivation to tell the truth, courts should not cling to old forms for consistency's sake."[82]

In *United States v Gigante*, the Second Circuit declined to follow *Craig* altogether, and upheld the government's use of two-way closed-circuit video to take testimony from a critically ill, "crucial witness against [the defendant]." The Court declined to follow *Craig*, and instead applied an "exceptional circumstances" test that did not require the government to articulate an important public policy interest or demonstrate that the reliability of the testimony was otherwise assured. Instead, the Court held that the two-way video procedure in and of itself preserved all of the "characteristics of in-court testimony: [The witness] was sworn; he was subject to full cross-examination; he testified in full view of the jury, court, and defense counsel; and [the witness]

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[81] *Rogerson, supra*, at 496-508.

[82] *Id* at 508-511 (Hecht, J., concurring).

gave this testimony under the eye of [the defendant] himself." As such the Court found that the defendant had not been deprived of *any* of the constitutional protections of confrontation.[83]

The *Gigante* Court distinguished *Craig* on the grounds that it dealt with one-way video testimony—"where the witness could not possibly view the defendant"—as opposed to the two-way video system employed in *Gigante* that "preserved the [defendant's right to] face-to-face confrontation." As the two procedures were distinctly different, the Court said it was "not necessary to enforce the *Craig* standard in [*Gigante's*] case."[84] The government in *Gigante* had asserted that the witness was critically ill and could not travel, but that factor was only considered under the less stringent "exceptional circumstances" test that the Court employed.

On the other hand, the Ninth Circuit recently decided *United States v Carter*, and held that the *Craig* standard applies to both child and adult witnesses testifying by video, whether one-way or two-way. *Carter* involved the two-way video testimony of an adult victim of sex trafficking.[85] The Court's rationale was that it was in line with "the 'core' of the Confrontation Clause guarantee—providing the accused an 'opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact.'" In that regard, the Court went on to say that "physical confrontation" at trial promotes reliability and fairness because "[i]t is always more difficult to tell a lie about a person to his face than behind his back."[86] "So too does compelling [witnesses] to stand

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[83] *United States v Gigante*, 166 F3d 75, 79-80 (CA 2, 1999) (emphasis added).

[84] *Id* at 81.

[85] At the time the offense occurred, the victim was a minor child.

[86] *United States v Carter*, 907 F3d 1199, 1202, 1206-1207 (CA 9, 2018) (internal quotation and citation omitted).

face to face with the jury as they tell their side of the story."[87] "Any procedure that allows an adverse witness to testify remotely necessarily diminishes the profound [truth-inducing] effect upon a witness of standing in the presence of the person the witness accuses."[88] The error was not harmless, because the victim was a crucial witness, and—taking out her testimony—the remaining evidence would not have been sufficient to convict.[89]

The Sixth Circuit has also applied *Craig* in a habeus case to determine the constitutionality of remote testimony, but under wholly different circumstances than those in the instant case. In *Brumley v Wingard*, the Sixth Circuit applied *Craig* narrowly to hold that the admission of an incarcerated witness's videotaped deposition testimony violated the defendant's right to confrontation, where "the deposition [ ] [was] the key piece of evidence."[90] The Court relied heavily on *Ohio v Roberts,* which has since been abrogated by *Crawford.*

Defendant acknowledges that at least one state—Montana—has upheld two-way video testimony of an out-of-state doctor via skype. In *Missoula v Duane*, the defendants were charged with animal abuse after a puppy died in their care. The doctor who performed the necropsy and determined the cause of death—blunt force trauma—was allowed to testify via two-way video. The Montana Supreme Court cited *Craig* for its premise that the Confrontation Clause has never guaranteed defendants an absolute right to face-to-face confrontation. The Court also noted that the

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[87] *Id* at 1207 (internal quotation and citation omitted).

[88] *Id* (internal quotation and citation omitted).

[89] *Id* at 1210-1211.

[90] *Brumley v Wingard*, 269 F3d 629, 632-647 (CA 6, 2001) (affirming district court's grant of habeus relief).

Montana Constitution, which in many respects offered "greater protection" than the United States Constitution, had never been interpreted to require *literal* face-to-face confrontation with all witnesses. Ultimately, the Court found that cost considerations were sufficient to justify allowing two-way video testimony, without applying the *Craig* test.[91]

The doctor in *Missoula* was an even more critical witness than Cutler, as he testified to the cause and manner of death, yet the Montana Court declined to apply the *Craig* test and instead allowed two-way video testimony because of cost and travel concerns. It is doubtful that the Court loosened constitutional requirements based on the fact that the defendant was only charged with a misdemeanor, as defendant suggests. Although New Mexico and Iowa applied *Craig* to expert witnesses testifying by two-way video, the cases are distinguishable from the instant case, as the New Mexico witnesses' testimony was crucial as opposed to foundational and cumulative and the Iowa witnesses did not live out of state, as Cutler did.

This Court is not bound to follow *Craig* in the instant case, where Cutler's testimony was neutral and foundational, he did not offer an opinion as to defendant's identity, his work was verified by a live witness, his report was admissible even without his testimony *and* he testified via live two-way video.

(2) Even if this Court applies *Craig*, there was still no Confrontation Clause violation.

Even if this Court applies *Craig*, the admission of Cutler's video testimony did not infringe on defendant's confrontation right. *Craig* established a balancing test in which the necessity of remote testimony is weighed against the reliability of the testimony. On the side of necessity, courts

[91] *Missoula*, *supra,* at 291-296 (internal citations omitted).

have weighed a number of factors, including a witness's physical disability, medical condition, emotional trauma, agedness or youth, distance, cost to travel, and general inconvenience. On the side of reliability, courts have weighed whether the witness is a victim, fact witness or expert, whether the testimony is contested or corroborated, and whether the testimony is central to the government's case as opposed to neutral or foundational testimony.

Here, as in *Craig*, the Court of Appeals noted that the trial court was in compliance with three of the four requirements of the Confrontation Clause, as the witness testified under oath, the jury and defendant were able to observe him, and defendant was still able to cross-examine him while he testified. As to the face-to-face requirement, the Court of Appeals acknowledged that, under *Craig,* the face-to-face requirement is not absolute. Rather, the trial court was required to make a case-specific finding as to why it was necessary to dispense with the requirement.[92] The Court of Appeals found that this requirement was satisfied when the trial court stated on the record:

> [U]sually a lay witness it's very difficult having a video, but of an expert witness where all emotions are gone, that is admissible.
>
> * * *
>
> Anything that has to be shown to [the expert witness] can be shown to him. They have the different electronic devices [to aid] in passing [the evidence] back and forth.[93] 5/20, 14.

The Court of Appeals found that the trial court's decision to allow testimony by Skype was appropriate because the expert would be testifying in real time, and defendant would be able to view him and cross-examine him as he was testifying.[94] The Court of Appeals noted that Cutler would

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[92] *Jemison*, unpub op at 5 (893a).

[93] *Id* at 6 (894a).

[94] *Id* at 5-6 (893a-894a).

have had to travel from Salt Lake City, Utah and was merely testifying to a report indicating that he had processed the victim's rape kit and found male DNA. His testimony did not link defendant to the victim's kit. Defendant was later identified through a CODIS hit, and the prosecution called Maggert to testify as to how defendant came to be a suspect.[95] 585a-642a.

The Court of Appeals cited the fact that the witness had to travel from Utah as a justification for allowing him to testify remotely. And even if the trial court did not specifically cite distance concerns in its findings, it was obvious that the witness was out of state and could not travel from Utah on a moment's notice. Admittedly, the trial court's findings on the record as to the necessity prong under *Craig* are lacking. But the prosecutor was not intending to present Cutler's testimony via Skype until the defense—four days before trial—demanded that he testify. The prosecutor did not put forth a public policy interest upon which the court could have based a necessity finding, because she was relying on defendant's waiver under MCR 6.202. Further, even though it was not expressly stated, there is a public policy interest in allowing Cutler to testify by video, beyond "mere convenience" and cost considerations.

(a) The admission of two-way video testimony was necessary to further an important public policy interest.

This Court should interpret *Craig* broadly, where, as here, the government has a significant public policy interest in seeing that justice is done for thousands of victims of cold-case sexual assault cases whose rape kits were abandoned in a storage warehouse and sat untested for years. In *White v Maryland*, the Maryland Court of Appeals held, under *Craig*, that a two-way video testimony of a forensic serologist furthered the important public policy of solving cold-case sexual assault

[95] *Id* at 6-7 (894a-895a).

cases.[96] Here, Maggert testified that over eleven thousand rape kits had been discovered in the city of Detroit and that the Michigan State Police obtained a federal grant to be able to send out the kits for testing at private laboratories. She explained, "[W]e needed to find a way to get [the] kits processed and to do eleven thousand kits would absolutely drown us out at the laboratory." 600a.

Requiring forensic analysts to travel from Utah in order to testify to an uncontested report would circumvent the entire rationale behind using outsourced laboratories in the first place. Flying an out-of-state expert witness to give neutral, uncontroverted testimony— that is foundational in nature and that has been subjected to verification by another expert—is not effective resource allocation, and defeats the purpose of having an outsourced lab perform the analyses in the first place. The magnitude and urgency of the rape kit backlog problem is a sufficient public policy justification for allowing neutral expert testimony via two-way video, where the technology allows both parties to view each other in real time.

Of course, an even simpler remedy can be found in Michigan's notice-and-demand procedure. In *Bullcoming v New Mexico*, the United States Supreme Court observed, "notice-and-demand procedures, long in effect in many jurisdictions, can reduce burdens on forensic laboratories."[97] The fact that Michigan has a notice-and-demand procedure in place to address this very issue shows that it is necessary as a matter of public policy.

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[96] *White v Maryland,* 223 Md App 353, 386-401 (2015) (although the witness was also ill, the Court agreed with the State that "permitting the two-way live video testimony in this case furthered the public policy of resolving cold cases and protecting the witness...We are persuaded that the combined public policy justifications of resolving cold cases and simultaneously protecting the physical well-being of a significant witness are sufficient under *Craig.*").

[97] *Bullcoming v New Mexico*, 564 US 647, 666 (2011).

(b) The reliability of the testimony was otherwise assured.

Defendant has not challenged the reliability of Cutler's testimony. On appeal, defendant's argument centers around the first prong under *Craig*—the necessity prong. In any event, Cutler's testimony was reliable. His testimony was foundational in nature and his work was verified by Maggert. Any doubt about the accuracy of Cutler's testimony was put to rest when Maggert testified as to the verification process. Cutler was not a "conventional" witness—he was not the victim, he did not perceive the crime as it was happening, and his testimony did not implicate defendant. Cutler was a "neutral" witness. He did not have any vested interest in defendant's case, such that it would be crucial for the jury to see his demeanor up close and in court.

C. If there was a Confrontation Clause violation, the error was harmless beyond a reasonable doubt.

Confrontation Clause errors, including the denial of face-to-face confrontation, are subject to harmless error analysis.[98] The burden is on the beneficiary of the error to prove that there is no "reasonable possibility that the evidence complained of might have contributed to the conviction."[99] Whether a Confrontation Clause error is harmless beyond a reasonable doubt requires an assessment of several factors, including "the importance of the witness's testimony to the prosecution's case, whether the testimony is cumulative, the presence or absence of corroborating or contradictory testimony, and the overall strength of the prosecution's case."[100] In assessing harmlessness, it is not

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[98] *Shepherd*, *supra.*

[99] *Chapman v California*, 386 US 18, 23 (1967), quoting *Fahy v State of Connecticut*, 375 US 85, 86-87 (1963).

[100] *Michigan v Watson*, 245 Mich App 572, 585 (2001), quoting *Michigan v Kelly*, 231 Mich App 627, 645 (1998); see also *Delaware v Van Arsdall*, 475 US 673, 684 (1986); *United*

enough to consider whether a witness's testimony would have been unchanged if there had been confrontation. Rather, a determination of harmlessness must be "based on the remaining evidence."[101] "[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt."[102]

(1) The error did not contribute to the verdict.

Unlike in *Carter* and *Rogerson, supra*, if Cutler's testimony had not been taken by video, his report would have been admitted under MCR 6.202 without any testimony at all, and the outcome of defendant's trial would have been the same. The foundational DNA evidence that ultimately led to defendant's identification—Cutler's lab report—was admissible regardless of whether Cutler had testified by video. It became admissible when defendant failed to file an objection pursuant to the notice-and-demand rule. In fact, the prosecutor was not even planning to call Cutler, as evidenced by the fact that he was not even endorsed on her witness list. At the pretrial hearing on May 20, 2016, the prosecutor told the court that her intention was to admit all of the lab reports under MCR 6.202 and then call one analyst—Maggert—to explain what they meant along with her conclusions. As to Cutler, the prosecutor said, "The other analyst by the name of Derek Cutler from Sorenson Forensics is out of Utah, and if his testimony becomes necessary and - - *he's a witness on my list but he's not endorsed*. So, *if his testimony becomes necessary*, I would then have him available by video." 109a.

States v Carter, 907 F3d 1199, 1210 (CA 9, 2018).

[101] *Coy v Iowa*, 487 US 1012, 1021-1022 (1988).

[102] *Van Arsdall*, *supra,* at 681.

It was the defense that wanted to cross-examine Cutler,[103] and that was why the prosecutor offered to have him testify via video. 109a. But, because the time for defendant to request the live presence of the witness had long since passed, the prosecutor had not even endorsed the witness. And she did not have to, because the analyst's report was "admissible in evidence to the same effect as if [the analyst] had personally testified."[104] Assuming that Cutler's testimony had been taken out of the picture altogether, the prosecutor would have lost nothing. The testimony was cumulative to his report. It was defendant who benefitted by having Cutler on video, because he got to cross-examine him.

(2) All of the other requirements for confrontation remained intact.

Cutler's testimony was under oath, his testimony was subject to cross-examination, and the jury was able to observe his demeanor. As to the face-to-face requirement, defendant and Cutler *were* able to see each other face-to-face—albeit electronically over two-way video. The error was limited to Cutler not being physically present in the courtroom. This type of confrontation error is of a different category than the erroneous admission of testimonial hearsay, where *none* of the confrontation requirements are present—no face-to-face confrontation, no oath, no cross-examination, and no opportunity for the jury to view the declarant's demeanor. The error here, then, was not in the *admission* of Cutler's testimony, but in the fact that he was not physically present *in the courtroom*. The nature of the confrontation error needs to be taken into account when assessing harmlessness—they are not all the same.

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[103]Defendant's trial counsel said at the hearing that he would not stipulate to video testimony, particularly for an expert witness, because Cutler may have to look at reports and physical evidence in order to explain them during his testimony. 5/20, 13.

[104]MCR 6.202.

(3) The reliability of the testimony was not in question.

As a purely foundational expert witness, Cutler's testimony falls into the category of "neutral scientific" testimony. Cutler's testimony was also corroborated and verified by Maggert. Maggert was the analyst who actually entered the DNA profile into the CODIS database, and later compared the DNA profile to defendant's buccal swab. It was Maggert, not Cutler, who offered her conclusion that defendant's DNA was present on the victim's vaginal swab and genital gauze samples. 622a-642a. There could be no doubt as to the reliability of Cutler's testimony, because all he did was develop an unknown male DNA profile. It was Maggert who determined that the profile matched defendant's own DNA. Defendant was not accused immediately based on the CODIS hit that resulted from the Sorenson sample. Defendant was only identified after Maggert compared his buccal swab to the Sorenson profile, which served as a check against Cutler's work.

Unlike in *Carter*, *supra*, Cutler was not a victim witness. Although expert testimony is still subject to confrontation requirements, the *type* of witness that Cutler was ought to be considered when assessing harmlessness. Cutler—unlike a fact witness or victim (the so-called "conventional" witnesses)—had no reason to lie, and no reason to be afraid to face defendant. Most of the time, the Confrontation Clause is concerned with the admission of testimonial hearsay without *any* opportunity for cross-examination.[105] In that instance, none of the four requirements for confrontation are satisfied. There is no face-to-face meeting, no testimony under oath at trial, no cross-examination at trial, and no opportunity for the trier of fact to observe the witness's demeanor. That situation is inherently different than what occurred here, where all of the four confrontation

[105] *Crawford*, supra, at 53.

requirements remained intact—including the face-to-face requirement—albeit not face-to-face in the courtroom.

(4) Defendant never contested the DNA evidence.

Consent, not identity, was a consistent theme presented by the defense during defendant's trial. Trial counsel argued at a pretrial hearing that the nature of the victim's relationship was "who knew who when and what the relationship was is what this case is all about." 60a. Counsel also argued, in both opening and closing, that defendant's DNA was in the victim's rape kit because they may have had a consensual sexual encounter. 325a; 797a-799a. Counsel did argue that the minor DNA profile may have been attributable to the actual rapist, but he did so while also acknowledging the presence of defendant's DNA in the victim's rape kit. 795a-799a.

Appellate counsel argues that defendant's trial counsel only argued consent once he knew that the DNA evidence was coming in. But that can not be the case, because counsel was put on notice well before trial that the lab reports were coming in under MCR 6.202, and he never objected. At trial, counsel never challenged Cutler's findings, which only established that there was male DNA in the victim's rape kit. Counsel's cross-examination of Cutler was extremely brief, and it established that Cutler was merely reporting on the work of other analysts and that he could testify to the existence of a male DNA profile, but could not offer a conclusion as to the identity of the DNA donor(s). 728a. Trial counsel's entire cross-examination of Cutler only occupied three pages of the trial transcript, and aside from his qualifications as an expert, the testimony went unchallenged.[106] 727a-730a.

[106]The defense did also ask questions pertaining to Cutler's expert qualifications during voir dire, and objected to him being qualified as an expert. (712a-715a).

Even if this Court finds constitutional error, the error was harmless beyond a reasonable doubt. In *Idaho v Woods*, the Idaho Court of Appeals applied *Craig* to determine whether the defendant's confrontation rights were violated when the lower court allowed an expert witness to testify via a two-way video procedure. The witness's testimony served to lay a foundation for the admission of data that was retrieved from the defendant's cell phone. At the time, Idaho had not yet applied *Craig* in a case involving two-way video. The lower court declined to apply *Craig* in a two-way video scenario, and allowed the testimony, citing the foundational nature of the witness's testimony as well as time and cost considerations.

The Idaho Court of Appeals, applying *Craig*, found that the government had not made a sufficient showing of necessity where the reason given was "physical and logistical problems of transporting the expert cross-country." Still, the error was harmless beyond a reasonable doubt. The Court of Appeals found that there was sufficient evidence on the record as a whole to support the defendant's conviction even without the tainted testimony, and that the testimony was cumulative to other properly admitted evidence.[107]

Here, as in *Woods*, Cutler was a neutral, foundational witness. His testimony was cumulative to his report, which was already deemed admissible under MCR 6.202. Defendant never challenged Cutler's conclusions, which were checked for accuracy and corroborated by Maggert. Even without Cutler's testimony, the outcome of defendant's trial would have been the same. The error, if any, was harmless beyond a reasonable doubt.

[107] *Idaho v Woods*, 165 Idaho 329, 903-906 (2019).

D. Conclusion

Defendant is correct that MCR 6.006 was violated, as he did not consent to allow Cutler to testify via video. But the alternative would have been for the prosecutor to simply admit Cutler's report into evidence, without any testimony. As it was, defendant got to cross-examine Cutler, which was more than he was entitled to. MCR 6.006 and MCR 6.202 need to be looked at together—not in isolation. Every other state that has addressed this situation has found waiver. But even if the issue is not deemed waived, defendant's confrontation right was not violated.

Whether this Court applies *Craig* or not, there needs to be a balancing test to weigh the impact on the defendant from the loss of face-to-face confrontation versus the hardship on the prosecution witness and the significance of the government's interest in securing the testimony remotely. Where the cost to the defendant is greatest, such as where the defendant would lose *all* ability to view a *victim* witness's demeanor through the use of telephonic or one-way video, then the prosecution should have to meet a higher threshold to justify the use of those procedures. In a case like *Craig*, where the witness testifying remotely is the actual victim and where the procedure being used would not allow for the witness to look at the defendant while testifying, cost and convenience would not— and should not—be enough to outweigh the defendant's confrontation right.

But where, as here, the witness is a neutral, scientific witness—whose testimony is uncontested, cumulative, corroborated, and foundational—and where the procedure being employed allows both the witness and the defendant to view each other remotely, then cost and convenience are reason enough to justify allowing the procedure. The government's policy interest in expediting the testimony of neutral lab witnesses, who would otherwise be taken away from testing evidence to fly to an out-of-state trial, can outweigh the defendant's right to in-court, face-to-face

confrontation. Where the witness has no reason to lie and the defendant is able to view and cross-examine him virtually, the disruption to the defendant's confrontation right is minimal and the balancing test weighs in favor of the prosecution. This is particularly true where, as here, this Court has put a procedure in place to address these types of cost and convenience concerns—MCR 6.202—and that procedure was followed.

Lastly, even if this Court finds error, it was harmless beyond a reasonable doubt because all of the other protections remained intact, the testimony was reliable, and—most importantly—Cutler's report would have come into evidence anyway and the outcome of defendant's trial would have been the same. To hold otherwise would allow defendants to change their mind in the middle of trial—after having waived a witness's testimony—and would force the prosecution to fly witnesses to court on a moment's notice. To create such a rule would be contrary to *Melendez-Diaz*, and to this Court's rationale in adopting MCR 6.202.

RELIEF

Wherefore, the People respectfully request that this Court affirm the Court of Appeals' decision, or, in the alternative, remand the matter to the trial court for a determination as to harmlessness.

Respectfully submitted,

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Dated: December 13, 2019
AMS/ms

INDEX OF APPENDICES

Appendix 1b

Case name	Type of witness	Reason for remote testimony	Type of technology	Properly admitted?
Arizona v Moore, 203 Ariz 515 (2002)	☒ **Crucial** - The testimony directly contradicted the defendant ☐ **Neutral/Foundational**	Witness's busy schedule	☐ One-way ☐ Two-way ☒ Other (Telephonic)	☐ Yes ☒ No
Lewis v Arkansas, 2019 Ark App 43 (2019)	☒ **Crucial** - He testified to evidence he recovered from the extraction of the defendant's phone ☐ **Neutral/Foundational**	Prosecution detective witness had out-of-state job training	☐ One-way ☒ Two-way ☐ Other	☐ Yes ☒ No The error was harmless
Topping v Colorado, 793 P 2d 1168 (1990)	☒ **Crucial** - Expert doctor testified to her examination of the sexual assault victim and her conclusion that the victim had been sexually assaulted ☐ **Neutral/Foundational**	Mere inconvenience to witness	☐ One-way ☐ Two-way ☒ Other (Telephonic)	☐ Yes ☒ No The error was harmless Decided prior to *Craig*.
United States v Yates, 438 F 3d 1307 (CA 11, 2006)	☒ **Crucial** - "Essential" fact witnesses in fraud case ☐ **Neutral/Foundational**	Witnesses unwilling to travel from Australia	☐ One-way ☒ Two-way ☐ Other	☐ Yes ☒ No
In Interest of ET, 342 Ga App 710 (2017)	☒ **Crucial** - The witness was the victim and identified the defendant ☐ **Neutral/Foundational**	Ill child witness; government cited economical considerations for using video as opposed to more expensive deposition procedure allowed under Georgia law that would have allowed literal face-to-face confrontation	☐ One-way ☒ Two-way ☐ Other	☐ Yes ☒ No The error was not harmless
Iowa v Rogerson, 855 NW 2d 495 (2014)	☒ **Crucial -** Expert lab analysts in an OWI case ☐ **Neutral/Foundational**	Time constraints and economic concerns	☐ One-way ☒ Two-way ☐ Other	☐ Yes ☒ No
In re Interest of SB, 263 Neb 175 (2002)	☒ **Crucial** - Expert psychiatrist in a mental health commitment hearing ☐ **Neutral/Foundational**	Busy schedule	☐ One-way ☐ Two-way ☒ Other (Telephonic)	☐ Yes ☒ No The error was not harmless

Appendix 2b

New Mexico v Schwartz, 327 P 3d 1108 (NM App, 2014)	☒ **Crucial** - Forensic scientists whose testimony linked defendant to the deceased body ☐ **Neutral/Foundational**	Inconvenience to witness to travel from out of state	☐ One-way ☒ Two-way ☐ Other	☐ Yes ☒ No The error was not harmless
New Mexico v Thomas, 376 P 3d 184 (NM, 2016)	☒ **Crucial** - Lab analyst testifying to DNA analysis that he had personally performed ☐ **Neutral/Foundational**	Inconvenience	☐ One-way ☒ Two-way ☐ Other	☐ Yes ☒ No
***New Mexico v Smith*,** 308 P3d 135 (2013)	☒ **Crucial** - Lab analyst testifying to the ultimate issue in the case - the defendant's blood results in an OWI case ☐ **Neutral/Foundational**	Inconvenience	☐ One-way ☒ Two-way ☐ Other	☐ Yes ☒ No
South Carolina v Johnson, 422 SC 439 (2018)	☒ **Crucial** - Prosecution detective witness testifying to voluntariness of the defendant's confession ☐ **Neutral/Foundational**	Inconvenience to witness to travel from out of state	☐ One-way ☒ Two-way ☐ Other	☐ Yes ☒ No The error was harmless
New Jersey v Benitez, 360 NJ Super 101 (2003)	☒ **Crucial** - Robbery victim ☐ **Neutral/Foundational**	Physical and mental limitations of ninety-four year old witness	☐ One-way ☐ Two-way ☒ Other (Videotaped deposition)	☐ Yes ☒ No
***Pa. v* Atkinson,** 2009 Pa Super 239 (2009)	☒ **Crucial** - The witness was a co-conspirator in the defendant's drug crimes ☐ **Neutral/Foundational**	Incarcerated witness/expediency	☐ One-way ☒ Two-way ☐ Other	☐ Yes ☒ No The error was harmless
Vermont v Tribble, 193 Vt 194 (2012)	☒ **Crucial** - Medical examiner in a murder case - his testimony regarding bullet trajectory undermined the defendant's self-defense claim ☐ **Neutral/Foundational**	The witness would be in New Zealand at the time of trial but was willing to travel; not unavailable	☐ One-way ☐ Two-way ☒ Other (Videotaped deposition)	☐ Yes ☒ No Did not apply *Craig*; The error was not harmless

Appendix 3b

City of Missoula v Duane, 380 Mont 290 (2015)	☒ **Crucial** - Expert veterinarian who performed necropsy in animal abuse case ☐ **Neutral/Foundational**	Travel expense for out-of-state witness to testify in three separate trials	☐ One-way ☒ Two-way (Skype) ☐ Other	☒ Yes ☐ No Did not apply *Craig*
Bush v Wyoming, 2008 WY 108 (2008)	☒ **Crucial** - Married fact witnesses in murder prosecution both testified via two-way video; one spouse was ill and could not travel ☐ **Neutral/Foundational**	Illness of witness's spouse	☐ One-way ☒ Two-way ☐ Other	☐ Yes ☒ No The error was harmless
Louisiana v Luckey, 212 So 3d 1220 (La App 5 Cir 2/8/17)	☒ **Crucial** - The witness was an "accusatory" rebuttal witness ☐ **Neutral/Foundational**	Avoiding delay in trial for transport of an incarcerated witness	☐ One-way ☒ Two-way ☐ Other	☐ Yes ☒ No The error was harmless
United States v Carter, 907 F3d 1199 (2018)	☒ **Crucial** - Adult victim of sex trafficking ☐ **Neutral/Foundational**	Pregnancy/unable to travel.	☐ One-way ☒ Two-way ☐ Other	☐ Yes ☒ No The error was not harmless
Brumley v Wingard, 269 F 3d 629 (CA 6, 2001)	☒ **Crucial** - Witnessed murder ☐ **Neutral/Foundational**	Incarcerated witness	☐ One-way ☐ Two-way ☒ Other (Videotaped deposition)	☐ Yes ☒ No The error was not harmless
West Virginia v Gary F, 189 W Va 523 (1993)	☒ **Crucial** - Co-defendant testimony ☐ **Neutral/Foundational**	Incarcerated witness	☐ One-way ☐ Two-way ☒ Other (Telephonic)	☐ Yes ☒ No