



SUPREME COURT OF MISSOURI

en banc

IN THE INTEREST OF: C.A.R.A.,

Appellant,

v.

JACKSON COUNTY JUVENILE
OFFICE,

Respondent.

Opinion issued January 11, 2022

No. SC99231

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY

The Honorable Jalilah Otto, Judge

The Jackson County circuit court found C.A.R.A. committed acts that would constitute first-degree statutory sodomy if committed by an adult. C.A.R.A. appeals, arguing the circuit court erred in permitting witness testimony via two-way live video because it violated C.A.R.A.'s right to confrontation under the United States Constitution and the Missouri Constitution. The circuit court's judgment is vacated, and the case is remanded.

Facts and Procedural History

The Jackson County juvenile officer filed a first amended petition, alleging C.A.R.A. committed acts that would constitute first-degree statutory sodomy if

committed by an adult.¹ The juvenile officer alleged C.A.R.A. had deviate sexual intercourse with S.V. by inserting C.A.R.A.'s finger into S.V.'s vagina. At the time of the alleged offense, C.A.R.A. was 12 years old and S.V. was five years old.

The adjudication hearing was continued multiple times at C.A.R.A.'s request. Prior to the adjudication hearing, C.A.R.A. filed an "Objection to Virtual Adjudication, and Request to Appear in Person" and argued C.A.R.A. had a constitutional and statutory right to face-to-face confrontation of witnesses. The juvenile officer filed a "Response to [C.A.R.A.]'s Objection to Virtual Adjudication" and argued the adjudication hearing should be held via videoconferencing technology due to the COVID-19 pandemic. In his argument, the juvenile officer cited this Court's order, *In re: Operational Directives for Easing COVID-19 Restrictions on In-Person Proceedings*,² and the Sixteenth Circuit's order, *In Re: Updated Court Operations upon Re-Opening of Courthouses*.³

The adjudication hearing was conducted using a "hybrid" format. C.A.R.A. renewed the objection to the witnesses testifying remotely via two-way video. The circuit court overruled the objection, stated its reasoning for doing so, and described the hybrid set up as follows:

¹ The Jackson County juvenile officer originally alleged four counts, two of which C.A.R.A. admitted and one of which the juvenile officer dismissed. None of these additional counts are at issue for this appeal.

² Exhibit A, Supreme Court of Missouri en banc, *In re: Operational Directives for Easing COVID-19 Restrictions on In-Person Proceedings* (May 4, 2020).

³ Exhibit B, Circuit Court of Jackson County, Missouri, 16th Judicial Circuit, *In Re: Updated Court Operations upon Re-Opening of Courthouses Administrative Order 2020-084* (May 14, 2020).

[I]n reviewing the Supreme Court [of Missouri] order and [the Sixteenth Circuit]'s order that were put in place in response to the COVID-19 pandemic that has affected the entire world, the Supreme Court [of Missouri] has permitted the use of Webex in all types of hearings at this time in the State of Missouri.

So we have a hybrid here. Just for the record, the setup is such that I am in the courtroom with my staff. [C.A.R.A.'s attorney] is here. [C.A.R.A.] is here. [C.A.R.A.'s grandparents] are here in the courtroom on the Webex camera. The juvenile officer, as well as the witnesses that are going to be called today, are also on the Webex. Counsel for the placement providers are on the Webex. As well as [C.A.R.A.'s] mother is on the Webex and counsel for mother is also on the Webex.

I recognize that there are times where technical difficulties can be quite challenging in these types of hearings. If those challenges arise, we can always suspend the proceedings, but as of right now, we're not having any of those issues. There also is a camera pointed to the gallery or the well of the courtroom so everyone on the Webex cannot [sic] only see me, but they can also see the courtroom, including [C.A.R.A.] and [C.A.R.A.'s attorney].

And there's a large . . . chalkboard-sized projection on the wall of what's going on with the Webex. So [C.A.R.A.'s attorney] and [C.A.R.A.] can see who is on the Webex call and who is talking at any given time. So everyone can see everyone basically in realtime.

There's also a way to share exhibits electronically with everyone on the Webex call, as well as any impeachable material can also be shared in that manner. And with that being said . . . I will order that we are going forward at this time in this manner.

Contrary to the circuit court's statements, this Court was careful to ensure its order incorporating the operational directives would not be interpreted to permit the violation of a juvenile's constitutional or statutory rights. Whether a hearing was required to be held during a pandemic—or continued until a hearing could be held safely—is a different issue from whether the law requires a hearing to be held in person and the witnesses be required to appear face-to-face. Once a circuit court determines an adjudication hearing must be held, nothing in this Court's Operational Directives expressly permit witnesses to appear remotely.

This Court's Operational Directives, entered May 4, 2020, specifically provided that "[p]roceedings pursuant to chapters 210 and 211 pertaining to juvenile delinquency" were excluded from the provisions allowing for remote proceedings. *In re: Operational Directives*, *supra* note 2 at C(2). After listing that exception and other exceptions, this Court directed:

Courts may set in-person hearings in the above listed proceedings but it does not mandate a judge set a hearing in any individual case. The presiding judge of each circuit court and the chief judges of each appellate court are authorized to determine the manner in which the listed in-person exceptions are to be conducted. **Such proceedings shall be limited to the attorneys, parties, witnesses, security officers, and other individuals necessary to the proceedings as determined by the judge presiding over the proceedings.** The judge presiding over such proceedings has the discretion to excuse jurors or other individuals who cannot or should not appear as a result of risks associated with COVID-19.

Id. (emphasis added).

This Court specifically cautioned about the requirement for in-person proceedings in delinquency adjudications. *Id.* This Court gave circuit court presiding judges the discretion to determine the manner of in-person proceedings. *Id.* But this Court specifically provided that parties, attorneys, and witnesses were among the people who are physically present at in-person proceedings. *See id.* Nothing in this Court's directives encouraging remote proceedings for many types of hearings supports the circuit courts determination that remote proceedings were authorized in this case irrespective of the juvenile's statutory and constitutional rights. In other words, nothing in this Court's directives permitted the circuit court to deny C.A.R.A.'s request for in-person

adjudication proceedings, over the objection of an accused to have the witnesses against him appear face-to-face.

The juvenile officer presented two-way video testimony from S.V., S.V.'s mother, and S.V.'s babysitter. The juvenile officer also presented evidence, over C.A.R.A.'s objection, of a video recording of S.V.'s forensic interview, a summary of the interview, and a marked-up anatomical drawing used during the interview. At the close of the juvenile officer's evidence, C.A.R.A. moved for a judgment of acquittal, which was overruled. C.A.R.A. did not present any evidence.

The circuit court sustained the allegation of first-degree statutory sodomy, beyond a reasonable doubt.⁴ After a dispositional hearing, the court ordered C.A.R.A. be committed to the custody of the Director of Family Court Services for residential placement. C.A.R.A. appealed, and the court of appeals issued an opinion but then transferred the case to this Court pursuant to Rule 83.02. This Court has jurisdiction pursuant to article V, § 10 of the Missouri Constitution.

Standard of Review

"Juvenile proceedings are reviewed in the same manner as other court-tried cases." *D.C.M. v. Pemiscot Cnty. Juv. Off.*, 578 S.W.3d 776, 786 (Mo. banc 2019) (internal quotations omitted). "This Court will affirm a judgment in a juvenile proceeding unless it is not supported by evidence, is against the weight of evidence, or erroneously declares or applies the law." *Id.* "[T]he constitutional protections applicable in criminal proceedings are also applicable in juvenile delinquency proceedings due to the possibility of a

⁴ The circuit court also sustained the allegations C.A.R.A. previously admitted.

deprivation of liberty equivalent to criminal incarceration." *In re N.D.C.*, 229 S.W.3d 602, 605 (Mo. banc 2007). "Included among these rights are the rights to confrontation and cross-examination of witnesses." *Id.*

Whether a person's rights were violated under the Confrontation Clause is a question of law this Court reviews *de novo*. *State v. Justus*, 205 S.W.3d 872, 878 (Mo. banc 2006). "Properly preserved confrontation clause violations are presumed prejudicial." *Id.* at 881.

Analysis

C.A.R.A. argues the two-way live video testimony of S.V., S.V.'s mother, and S.V.'s babysitter at the adjudication hearing violated C.A.R.A.'s right to confrontation, cross-examination, due process, and effective assistance of counsel under the United States Constitution, U.S. Const. amends. VI, XIV, and the Missouri Constitution, Mo. Const. art. I, §§ 10, 18(a). C.A.R.A. properly preserved the Confrontation Clause violation for appeal by objecting to the virtual testimony before and at the adjudication hearing.

The Sixth Amendment's Confrontation Clause states "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. "[T]he Sixth Amendment's right of an accused to confront the witnesses against him is . . . made obligatory on the States by the Fourteenth Amendment." *Pointer v. Texas*, 380 U.S. 400, 403 (1965). The right to confrontation is "a fundamental right essential to a fair trial in a criminal prosecution." *Id.* at 404;

see also U.S. Const. amend. XIV ("No state shall . . . deprive any person of life, liberty, or property, without due process of law.").

The United States Supreme Court has not addressed the use of two-way live video feed in a criminal or juvenile adjudication proceeding and its impact on the right to confrontation. Three United States Supreme Court cases, however, examine a criminal defendant's right to confront adverse witnesses against him or her when that witness testimony falls short of in-person, face-to-face confrontation: *Coy v. Iowa*, 487 U.S. 1012 (1988), *Maryland v. Craig*, 497 U.S. 836 (1990), and *Crawford v. Washington*, 541 U.S. 36 (2004).

In *Coy*, the Supreme Court found a defendant's confrontation rights were violated when, pursuant to an Iowa statute, a large screen was placed between the defendant and minor witnesses testifying about alleged sexual abuse. 487 U.S. at 1014. After a discussion about the historical significance of the right to confrontation, the Supreme Court stated: "We have never doubted . . . that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Id.* at 1016. This guarantee, the Supreme Court said, "relate[s] both to appearances and to reality," *id.* at 1017, and "[t]he perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it," *id.* at 1019. The Supreme Court noted, although "[t]he Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant," the Clause "ensure[s] the integrity of the fact-finding process" by allowing the trier of fact to observe the witness and "draw its own conclusions." *Id.* at 1019-20 (alteration omitted). Ultimately, the Supreme Court

said the "rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests." *Id.* at 1020. The Supreme Court found the Iowa statute authorizing the testimony behind a screen violated the defendant's confrontation rights because there were "no individualized findings that these particular witnesses needed special protection." *Id.* at 1021. The Supreme Court added "something more than the type of generalized finding underlying such a statute is needed." *Id.* The Supreme Court declined to address "whether any exceptions exist" to the right of confrontation. *Id.*

The Supreme Court revisited the issue in *Craig* and rejected a Confrontation Clause challenge to a Maryland statute allowing a child abuse victim to testify via one-way, closed-circuit television, in certain circumstances. 497 U.S. at 860. The Maryland statute "permits a judge to receive, by one-way closed-circuit television, the testimony of a child witness who is alleged to be a victim of child abuse." *Id.* at 840. "To invoke the procedure, the trial judge must first 'determin[e] that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.'" *Id.* at 840-41 (alteration in original) (citing Md. Cts. & Jud. Proc. Code. Ann. § 9-102(a)(1)(ii)).

Once the procedure is invoked, the child witness, prosecutor, and defense counsel withdraw to a separate room; the judge, jury, and defendant remain in the courtroom. The child witness is then examined and cross-examined in the separate room, while a video monitor records and displays the witness' testimony to those in the courtroom. During this time the witness cannot see the defendant. The defendant remains in electronic communication with defense counsel, and objections may be made and ruled on as if the witness were testifying in the courtroom.

Id. at 841-42. The trial court allowed the testimony, the Maryland Court of Special Appeals affirmed, and the Court of Appeals of Maryland reversed and remanded for a new trial but rejected the Confrontation Clause violation argument. *Id.* at 843. The Supreme Court of the United States vacated and remanded. *Id.* at 860. The Supreme Court held "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id.* at 850. The Supreme Court stated "the Confrontation Clause reflects a preference for face-to-face confrontation," *id.* at 849 (emphasis omitted) (citing *Ohio v. Roberts*, 448 U.S. 56, 63 (1980)), but criminal defendants do not have "the absolute right to a face-to-face meeting with witnesses against them at trial," *id.* at 844 (emphasis omitted). The Supreme Court acknowledged "use of the one-way closed-circuit television procedure, where necessary to further an important state interest, does not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause." *Id.* at 852. However, "[t]he requisite finding of necessity must of course be a case-specific one." *Id.* at 855. The Supreme Court set out three findings necessary to establish whether the case furthers an important public policy:

The trial court must hear evidence and determine whether use of the one-way closed-circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. . . . Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i.e.*, more than "mere nervousness or excitement or some reluctance to testify[.]"

Id. at 855-56 (internal citations omitted). However, just because "the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with." *Id.* at 850.⁵

In 2004, the Supreme Court established a new framework for analyzing a defendant's rights under the Sixth Amendment. *Crawford*, 541 U.S. at 36. The Supreme Court held "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68. The Supreme Court overruled *Ohio v. Roberts* and its "indicia of reliability" test. *Id.* at 68-69. After an examination of the history of the Sixth Amendment, the Supreme Court stated "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused," *id.* at 50, and "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination," *id.* at 53-54. The Supreme Court expressed disapproval of the unpredictable and subjective nature of balancing tests. *Id.* at 63-64. The Supreme Court also stated the *Roberts* balancing test was "so improbable that it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion." *Id.* at 67. "By replacing

⁵ The *Craig* Court recognized the one-way procedure it approved does not ordinarily satisfy confrontation requirements. *Craig*, 497 U.S. at 853 ("[A] State's interest in the physical and psychological well-being of child abuse victims" may be sufficient to "outweigh . . . a defendant's right to face his or her accusers in court" in only some cases.).

categorical constitutional guarantees with open-ended balancing tests, we do violence to [the Framers'] design." *Id.* at 67-68.

The Supreme Court has identified two purposes of the Confrontation Clause: the truth-seeking purpose and the symbolic purpose. *Craig*, 497 U.S. at 852. The truth-seeking purpose includes notions of promoting reliability, impressing upon witnesses the seriousness of their testimony, allowing the trier of fact to observe the demeanor of witnesses, and subjecting the witnesses to cross-examination. *See Coy*, 487 U.S. at 1019 ("A witness may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts . . . even if [a] lie is told, it will often be told less convincingly." (internal quotation omitted)); *Craig*, 497 U.S. at 846 (The Confrontation Clause "ensur[es] that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings. . . . [F]ace-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person."); *California v. Green*, 399 U.S. 149, 158 (1970) ("Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the greatest legal engine ever invented for the discovery of truth; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." (internal quotation omitted));

Lee v. Illinois, 476 U.S. 530, 540 (1986) ("The right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials.").

The symbolic purpose consists of promoting "an open and even contest in a public trial." *Lee*, 476 U.S. at 540 ("[T]he Constitution provides certain safeguards to promote to the greatest possible degree society's interest in having the accused and accuser engage in an open and even contest in a public trial."); *Coy*, 487 U.S. at 1017 ("[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as essential to a fair trial in a criminal prosecution." (internal quotation omitted)).

Other jurisdictions addressing whether witness testimony via two-way live video satisfies the Confrontation Clause generally follow one of three approaches: (1) *Craig*, (2) the Second Circuit's test in *Gigante*, or (3) *Crawford*. See *infra United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999).

A.

Most federal and state courts that have addressed this issue utilize *Craig*'s test. These courts hold a defendant's rights under the Confrontation Clause are violated by the use of two-way video procedure unless such procedure is necessary to further an important public policy and the reliability of the testimony is otherwise assured. See generally *State v. Mercier*, 479 P.3d 967, 976 (Mont. 2021); *Haggard v. State*, 612 S.W.3d 318, 325-26 (Tex. Crim. App. 2020); *United States v. Carter*, 907 F.3d 1199, 1208 (9th Cir. 2018); *State v. Thomas*, 376 P.3d 184, 193-94 (N.M. 2016); *United States v. Abu Ali*, 528 F.3d 210, 240-41 (4th Cir. 2008); *Bush v. State*, 193 P.3d 203, 214-15

(Wyo. 2008); *United States v. Yates*, 438 F.3d 1307, 1314 (11th Cir. 2006); *United States v. Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005).

Craig's holding has widely been interpreted to allow child sex abuse victims to testify via two-way video, as well as one-way video. *See, e.g., Bordeaux*, 400 F.3d at 554. Some courts have extended *Craig* to apply to adult witnesses, as well as child witnesses, in all cases of two-way video. *See, e.g., Carter*, 907 F.3d 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.").

The reliability portion of *Craig's* test is met by a "combined effect of these elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact." *Craig*, 497 U.S. at 846. Because the *Craig* Court stated the combination of oath, cross-examination, and observation of a witness's demeanor "adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony," the reliability portion of *Craig's* test is generally not discussed in detail by courts. *Id.* at 851.

Craig's test requires courts to engage in a case-specific finding to analyze the necessity prong. There is not much uniformity across jurisdictions as to what this prong requires or what satisfies it. It is widely held that convenience, efficiency, and cost are insufficient to support the necessity prong. *See generally Thomas*, 376 P.3d at 195; *State v. Rogerson*, 855 N.W.2d 495, 507 (Iowa 2014); *Commonwealth v. Atkinson*, 987 A.2d

743, 750 (Pa. Super. Ct. 2009). But that is not always the case. *See Harrell v. State*, 709 So. 2d 1364, 1370 (Fla. 1998) (finding the "important state interest in resolving criminal matters in a manner which is both expeditious and just" satisfied the necessity prong of *Craig*). Conversely, permanent illness, the existence of no viable alternatives to the two-way video, and the witness being located outside the United States have been found sufficient to support the necessity prong.⁶ *See generally Carter*, 907 F.3d at 1208-09; *Rogerson*, 855 N.W.2d at 506-07; *Atkinson*, 987 A.2d at 748; *Bush*, 193 P.3d at 215-16; *Horn v. Quarterman*, 508 F.3d 306, 319-20 (5th Cir. 2007); *Yates*, 438 F.3d at 1316. Under this prong, "important public policy" is a policy that would generally affect more than one case. *See, e.g., Yates*, 438 F.3d at 1316 ("[T]he prosecutor's need for the video conference testimony to make a case and to expeditiously resolve it are not the type of

⁶ Common "viable alternatives" to two-way video include issuing a continuance and obtaining a pre-trial deposition. Missouri Rule 25.14 permits a prosecuting attorney or defense attorney to file a motion to take the deposition of a witness to preserve such testimony. A defendant has a right to attend the deposition or "personally waive the right to be present and the right of confrontation in writing or in open court." Rule 25.14. The deposition may be used by either party at trial, with Rule 25.13 governing if offered by the defendant and Rule 25.16 governing if offered by the State. As relevant here, Rule 25.16 allows the state to use the deposition if the defendant

- (1) Was personally present at the deposition and had the right of confrontation and cross-examination at the deposition, or (2) Personally waived that right to be present and the right of confrontation in writing or in open court, or (3) Failed to attend the deposition after the court ordered defendant to do so.

Rule 25.16(a)(1)-(3). The State must also show the witnesses is unavailable because the witness

- (1) Is dead, (2) Is unable to attend or testify because of sickness or infirmity, (3) Has invoked a testimonial privilege or other refusal to testify not produced by the action of the state, or (4) Is otherwise unavailable and the state has made a good faith effort to obtain the presence of the witness at the hearing or trial, but has been unable to procure the attendance of the witness.

Rule 25.16(b)(1)-(4). A pretrial deposition is also available under Federal Rule of Criminal Procedure 15.

public policies that are important enough to outweigh the Defendants' rights to confront their accusers face-to-face.").

In the specific context of the COVID-19 pandemic, some courts applying *Craig's* test recognize protecting the public health is an important public policy. *See Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 838 (Mass. 2021). But witness-specific findings of a particular risk associated with COVID-19, such as having an underlying health condition or testing positive for COVID-19 during the time period the testimony is set to occur, are required to meet the necessity prong. *See State v. Comacho*, 960 N.W.2d 739, 754-56 (Neb. 2021); *Commonwealth v. Gardner*, No. 2020-CA-1383-MR, 2021 WL 3573304, at *3-4 (Ky. Ct. App. Aug. 13, 2021) (unpublished opinion); *United States v. Kail*, No. 18-CR-00172-BLF-1, 2021 WL 1164787, at *1 (N.D. Cal. Mar. 26, 2021); *People v. Warner*, No. ST-17-CR-031, 2020 WL 8019120, at *2 (V.I. Super. Ct. Nov. 2, 2020) (mem.); *United States v. Pangelinan*, No. 19-10077-JWB, 2020 WL 5118550, at *3-4 (D. Kan. Aug. 31, 2020); *United States v. Casher*, No. CR 19-65-BLG-SPW, 2020 WL 3270541, at *2-3 (D. Mont. June 17, 2020).

Whether a continuance is a viable alternative to two-way video testimony during the COVID-19 pandemic is unclear. *Compare Casher*, 2020 WL 3270541, at *3 ("In this case, there are no realistic alternatives available to the Court. First, the Court already considered a continuance but found it impracticable. COVID-19 is unprecedented as much as it is unpredictable. . . . [T]here is no way for the Court to know when the crisis will end." (internal citation omitted)); and *Commonwealth v. Masa*, No. 1981CR0307, 2020 WL 4743019, at *5 (Mass. Super. Aug. 10, 2020) (unpublished opinion) ("There

seems to be little chance that these risks will have materially diminished by late October, if the Court were to grant [the defendant]'s request to put off his hearing until then."), *with Pangelinan*, 2020 WL 5118550, at *4 ("[T]he court could . . . continue this matter until the transmission rate of the virus improves. . . . Under the circumstances here, there are reasonable alternatives which would allow this case to proceed, including a continuance."). *Kail* described an additional viable alternative to two-way video testimony when a witness claimed a medical accommodation to testifying in person: "[T]he Court recognizes the medical hardship [the witness] faces, and will reduce the number of people in the courtroom to a bare minimum and locate people as far from the witness stand as practically possible during his testimony." 2021 WL 1164787, at *1.

In addressing the reliability prong of *Craig*'s test in the context of the COVID-19 pandemic, at least one court has discussed the specific type of testimony at issue, to weigh the importance of a credibility judgment as to that particular witness. *See Comacho*, 960 N.W.2d at 756 (A witness was allowed to testify via two-way video to translate portions of telephone calls because it "was not testimony in which an assessment of credibility was as vital or as nuanced as it would be for testimony by the victim of the crime charged or by an eyewitness" and the jury could "listen to the calls and determine whether [the witness's] translations appeared reliable in context.").

B.

As a departure from *Craig*, the Second Circuit established a more lenient standard. In *Gigante*, the Second Circuit allowed a witness to testify via two-way live video because of the witness's "fatal illness and participation in the Federal Witness Protection

program" as well as the defendant's refusal to attend a Rule 15 deposition due to ill health. 166 F.3d at 81-82. The Second Circuit determined "it is not necessary to enforce the *Craig* standard" because the two-way video, as opposed to one-way, "preserved the face-to-face confrontation celebrated [in] *Coy*." *Id.* at 81. The Second Circuit made a "more profitable comparison" to the standard for a Rule 15 deposition and held, "[u]pon a finding of exceptional circumstances, . . . a trial court may allow a witness to testify via two-way closed-circuit television when this furthers the interest of justice." *Id.* Ultimately, the Second Circuit concluded testimony via two-way live video "afforded greater protection of [the defendant]'s confrontation rights than would have been provided by a Rule 15 deposition" because the jury could judge the witness's "credibility through his demeanor and comportment." *Id.* In making this conclusion, however, the Second Circuit recognized "[t]here may well be intangible elements of the ordeal of testifying in a courtroom that are reduced or even eliminated by remote testimony." *Id.* *Gigante* has been adopted only in one other circuit, and it was an unpublished opinion. *See United States v. Benson*, 79 F. App'x 813, 821 (6th Cir. 2003).

Federal district courts in the Second Circuit applying *Gigante* in the context of the COVID-19 pandemic and require witness-specific findings of a particular risk associated with COVID-19 to meet the exceptional circumstances standard. *See United States v. Akhavan*, 523 F. Supp. 3d 443, 455 (S.D.N.Y. 2021); *United States v. Donziger*, No. 11-CV-691 (LAK), 2020 WL 5152162, at *2-3 (S.D.N.Y. Aug. 31, 2020); *see also United States v. Davis*, No. 19-101-LPS, 2020 WL 6196741, at *2-4 (D. Del. Oct. 22, 2020) (applying *Gigante* because "[n]either the parties nor the Court has found any

controlling Third Circuit law concerning the use of remote videoconferencing technology to provide live witness testimony during a jury trial in a criminal case").

C.

A third approach is to apply *Crawford* to cases involving two-way video procedures. *People v. Jemison*, 952 N.W.2d 394, 396 (Mich. 2020).⁷ It is beyond debate that for two decades preceding *Crawford*, reliability was the touchstone of the Supreme Court's Confrontation Clause doctrine. In *Roberts*, the Supreme Court held the Confrontation Clause was not a barrier for admission of a hearsay declarant's statement if the testimony bore adequate "indicia of reliability." 448 U.S. at 66. *Crawford* overruled *Roberts* and transformed the Supreme Court's approach to the Confrontation Clause doctrine from a case-by-case reliability-balancing test to a categorical rule: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford*, 541 U.S. at 68-69.

Craig, decided before *Crawford*, operated under the *Roberts* "indicia of reliability" framework. In *Craig*, the Supreme Court identified four considerations courts should weigh to determine reliability—physical presence, whether the testimony was taken under oath, whether the accused had an opportunity to cross-examine, and whether the jury could observe the witness's demeanor. 497 U.S. at 845-46. After weighing the four

⁷ A few courts have suggested *Crawford* and *Craig* co-exist. See e.g., *Bordeaux*, 400 F.3d at 554-57 (applying *Craig* to a child's live testimony via two-way video at trial, and applying *Crawford* to a child's out-of-court statements to a forensic interviewer); *Yates*, 438 F.3d at 1314 n.4 ("*Crawford* applies only to testimonial statements made prior to trial, and the live two-way video testimony at issue in this case was presented at trial.").

factors, the Supreme Court determined the one-way video testimony was reliable and held admitting it was justified "where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate." *Id.* at 857.

Justice Scalia dissented in *Craig*. He rejected the majority's reliability balancing test, arguing it eliminated the right to confrontation because "the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was 'face-to-face' confrontation." *Id.* at 862 (Scalia, J., dissenting). "Whatever else [the Confrontation Clause] may mean in addition, the defendant's constitutional right 'to be confronted with the witnesses against him' means, always and everywhere, at least what it explicitly says: the 'right to meet face to face all those who appear and give evidence at trial.'" *Id.* (quoting *Coy*, 487 U.S. at 1016). Justice Scalia criticized the balancing test articulated by the *Craig* majority, stating it runs afoul to the text of the Constitution. *Id.* at 870. "We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings." *Id.* "For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it." *Id.*

Fourteen years later, Justice Scalia wrote for the majority in *Crawford*, and his dissent from *Craig* became the Supreme Court's view of the Confrontation Clause doctrine. The Supreme Court overruled *Roberts* because it is improper to "replac[e] categorical constitutional guarantees with open-ending balancing tests." 541 U.S. at

67-68. The Supreme Court held a defendant's confrontation right is absolute for testimonial evidence unless the witness is unavailable and the defendant had "a prior opportunity for cross-examination." *Id.* at 68. The Supreme Court discussed historical examples to illustrate why face-to-face testimony is critical. *Id.* at 43-50; *see also Jemison*, 952 N.W.2d at 399. For example, in Sir Walter Raleigh's 1603 trial for treason, Raleigh argued his accuser lied in order to save himself and demanded the accuser testify: "Call my accuser before my face." 541 U.S. at 44. The trial court refused Raleigh's request, the jury found him guilty, and he was sentenced to death. *Id.* As a result, "English law developed a right of confrontation that limited these abuses" against criminal defendants. *Id.* The Supreme Court doubted a reliability balancing test would have "provid[ed] any meaningful protection" in these cases. *Id.* at 68. Therefore, the Supreme Court restored face-to-face testimony as a fundamental element of a defendant's confrontation right. *Id.* at 57 (quoting *Mattox v. United States*, 156 U.S. 237 (1895)); *see also* Mo. Const. art. I, § 18(a) ("[I]n criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face.").

The *Roberts* reliability balancing test was the basis for *Craig*'s rule to allow important public policy considerations to override face-to-face confrontation only when it is necessary and the testimony is reliable enough. 497 U.S. at 850. When *Crawford* overruled *Roberts*, it put *Craig*'s reliability-focused rule into serious doubt.⁸ Whether

⁸ Many courts have noted *Crawford*'s potential effect on *Craig*'s holding. *See Jemison*, 952 N.W.2d at 396. ("*Crawford* did not specifically overrule *Craig*, but it took out its legs."); *Carter*, 907 F.3d at 1206 n.3 ("The vitality of *Craig* itself is questionable in light of the Supreme Court's

Craig continues to have any precedential value was well articulated by Judge Sutton in his concurring opinion in *United States v. Cox*:

Consider how they treated another decision of the Court: *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). *Craig* relied heavily, indeed almost entirely, on *Roberts* to justify its decision. 497 U.S. at 846–50, 110 S.Ct. 3157. But *Crawford* overruled *Roberts* with respect to testimonial statements. 541 U.S. at 60–69, 124 S.Ct. 1354.

Or consider how the two opinions characterized the Confrontation Clause guarantee. *Craig* treated the Clause as a safeguard for evidentiary reliability as measured by the judge in that case and today's rules of evidence. See 497 U.S. at 849, 110 S.Ct. 3157. But *Crawford* held that it was a procedural guarantee that "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination" in front of the accused. 541 U.S. at 61, 124 S.Ct. 1354.

Or consider how the opinions treated a defendant's right to face-to-face confrontation with the witnesses against him. *Craig* said that the "face-to-face confrontation requirement is not absolute." 497 U.S. at 850, 110 S.Ct. 3157. But *Crawford* said that a face-to-face meeting between an accuser and the accused was an essential part of the confrontation right. 541 U.S. at 43–45, 124 S.Ct. 1354. "Dispensing with confrontation because testimony is obviously reliable," *Crawford* observed, "is akin to dispensing with jury trial because a defendant is obviously guilty." *Id.* at 62, 124 S.Ct. 1354.

Or consider the methodology of each opinion. *Craig* looked to the "growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court" to identify new exceptions to the right to face-to-face confrontation. 497 U.S. at 855, 110 S.Ct. 3157. But *Crawford* looked to the original publicly understood meaning of confrontation to determine when the exception-free words of the guarantee ("[i]n all criminal prosecutions") should have exceptions. 541 U.S. at 42–50, 124 S.Ct. 1354.

Or consider how each opinion describes the relationship of the Clause to the rules of evidence. *Craig* worried that adherence to the words of the guarantee was "too extreme" and would "abrogate virtually every hearsay exception" developed by the rules of evidence up to that point. 497 U.S. at 848, 110 S.Ct. 3157 (quoting *Roberts*, 448 U.S. at 63, 100 S.Ct. 2531). But *Crawford* refused to rely on "the law of evidence" at the time of

later decision in *Crawford*."); *Thomas*, 376 P.3d at 193 ("*Crawford* may call into question the prior holding in *Craig* to the extent that *Craig* relied on the reliability of the video testimony.").

the trial because it "would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." 541 U.S. at 51, 124 S.Ct. 1354.

Or consider each opinion's view of exceptions to the guarantee. *Craig* offered no hint that there was any limit to the kinds of exceptions that the *Roberts* balancing test would allow then or in the future. But *Crawford* carefully identified the kinds of exceptions that might be allowed under its approach and conspicuously never mentions *Craig* as one of them. *See id.* at 53–55, 124 S.Ct. 1354.

871 F.3d 479, 492-93 (6th Cir. 2017) (Sutton, J., concurring).

Nevertheless, *Crawford* did not overrule *Craig*, and it is the Supreme Court's "prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Therefore, as this Court has contemporaneously held in *State v. Smith*, Slip Op. at 18, Missouri courts should certainly continue to apply *Craig* to the facts it decided: a child victim may testify against the accused by means of video (or similar *Craig* process) when the circuit court determines, consistent with statutory authorization and through case-specific showing of necessity, that a child victim needs special protection.

Whether the combination of oath, cross-examination, and observation of demeanor, when utilized in a two-way video setting in which the witness is in a remote location with minimal or no safeguards, is ever enough to ensure reliability of any witness does not have to be decided today because the circuit court made no witness-specific findings regarding unavailability. More importantly, this Court is not confident the issue would be decided the same way today. In denying certiorari in 2010, Justice Sotomayor stated:

This case presents the question whether petitioner's rights under the Confrontation Clause of the Sixth Amendment, as applied to the States through the Fourteenth Amendment, were violated when the State

introduced testimony at his trial via a two-way video that enabled the testifying witness to see and respond to those in the courtroom, and vice versa. The question is an important one, and it is not obviously answered by *Maryland v. Craig*. We recognized in that case that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial, but only where denial of such confrontation is necessary to further an important public policy. In so holding, we emphasized that the requisite finding of necessity must of course be a case-specific one. Because the use of video testimony in this case arose in a strikingly different context than in *Craig*, it is not clear that the latter is controlling.

Wrotten v. New York, 130 S. Ct. 2520, 2520 (2010) (Sotomayor, J., denying certiorari) (internal quotations, citations, and alterations omitted). To decide two-way video procedures categorically satisfy the safeguards of the Confrontation Clause would be to easily dispense with the "face-to-face confrontation requirement," something the Supreme Court required in *Crawford*, 541 U.S. at 68, and even expressly cautioned against in *Craig*, 497 U.S. at 850.

Even if the analysis of the *Craig* case was applied to this juvenile adjudication proceeding, the circuit court's judgment would be vacated. In this case, the circuit court failed to make the requisite findings for the alleged victim or any of the other witnesses. Prior to the hearing, the circuit court made reference to the existence of the COVID-19 pandemic, this Court's order regarding COVID-19 restrictions, and the Sixteenth Circuit's order regarding COVID-19 restrictions. However, the circuit court's conclusion that this Court's order granted permission to conduct C.A.R.A.'s adjudication hearing in a hybrid format with the witnesses testifying remotely via two-way video was erroneous.

This Court's COVID Operational Directives outlined phases of operation for Missouri courts to follow to gradually resume in-person appearances and proceedings.

In re: Operational Directives for Easing COVID-19 Restrictions on In-Person Proceedings, *supra* note 2. Each phase authorized resuming certain in-person proceedings and appearances, upon the order of the presiding judge or chief judge of the applicable circuit, based on findings of specific "Gateway Criteria." *Id.* at A-B. The "Gateway Criteria" outlined considerations "before resuming court activity or progressing to a new Operating Phase." *Id.* at A. The Sixteenth Circuit entered its order in response to this Court's order: "The Court will follow the Operational Directives and criteria set forth by the Missouri Supreme Court." *In Re: Updated Court Operations upon Re-Opening of Courthouses Administrative Order 2020-084*, *supra* note 3 at pg. 2.

Throughout the pandemic, this Court's orders have excepted from in-person proceedings that could be suspended "[p]roceedings necessary to protect the constitutional rights of criminal defendants." *In re: Operational Directives*, *supra* note 2 at C(2) (emphasis added). In all phases of operation, this Court's order contained a "Gateway Criteria" providing: "Encourage judges and court staff to continue utilizing all available technologies—including teleconferencing and video conferencing—**whenever possible to limit in-person courtroom appearances to the extent not prohibited by constitutional or statutory provisions.**" *Id.* at C(4), D(5), E(5), F(5) (emphasis added) (operating phase two and operating phase three contain slightly different language). The Sixteenth Circuit's order similarly provided: "Whereas, the Missouri Supreme Court has continued to encourage judges to utilize all available technologies—including teleconferencing and video conferencing—**to limit in person courtroom appearances**

to the extent not prohibited by the constitution or statutes as to the proceedings[.]"

In Re: Updated Court Operations, supra note 3 at pg. 2 (emphasis added).

Operating phase zero of this Court's order, the most stringent phase of operation, suspended all in-person proceedings, subject to exceptions, which included: **"Proceedings pursuant to chapters 210 and 211 pertaining to juvenile delinquency[.]"** *In re: Operational Directives, supra* note 2 at C(2) (emphasis added).

The Sixteenth Circuit's order also specifically addressed juvenile proceedings:

The Court Administrator/Deputy Court Administrator may resume programming operated by the Family Court Services, *provided however*, that the resumption of said programming can proceed in compliance with the Operational Directives, social distancing requirements, limitations on size of gatherings, other terms of this Administrative Order and guidelines of the Centers for Disease Control and Prevention.

In Re: Updated Court Operations, supra note 3 at pg. 4 (emphasis in original).

In addition to the circuit court's violation of C.A.R.A.'s constitutional right to confrontation as discussed previously by permitting the two-way video testimony of witnesses under the facts and circumstances of this case over objection, the circuit court also failed to follow this Court's order, which was carefully drafted to ensure the constitutional and statutory rights of juveniles were protected during the COVID-19 pandemic.

S.V.'s Testimony

S.V.'s testimony may have been the kind of testimony that could have been presented via two-way video. Because the United States Supreme Court has not reversed *Craig*, our circuit courts should apply our analysis in *State v. Smith*, Slip Op. at 18.

A child victim may testify against the accused by means of video (or similar *Craig* process) when the circuit court determines, consistent with statutory authorization and through a case-specific showing of necessity, that the child victim needs special protection.

The relevant Missouri statutory authority that would have guided the circuit court's findings to allow S.V. to testify via two-way video is § 491.699.⁹ The circuit court had to make findings, specific to S.V., regarding the elements of the offense charged and the emotional and psychological trauma to S.V. if required to testify in open court or to be brought into the personal presence of C.A.R.A.

The circuit court in this case made no witness-specific findings as to S.V. In the absence of such findings, S.V.'s testimony via two-way video was improper and a violation of C.A.R.A.'s right to confrontation pursuant to *Craig*.

Testimony of S.V.'s Mother and S.V.'s Babysitter Testimony

The other witness testimony in the case at bar is also governed by our analysis in *State v. Smith*, Slip Op. at 18. Under *Crawford*, witnesses may testify via two-way video only when the circuit court determines the witness is unavailable and the defendant had a

⁹ All statutory references are to RSMo 2016, unless otherwise indicated. The Missouri legislature enacted § 491.699 to provide alternative procedures to live in-court testimony for a child abuse victim in a juvenile proceeding. Upon motion by the juvenile officer, the circuit court may order an in-camera videotaped recording of the alleged child victim. § 491.699.1. The court is to consider "the elements of the offense charged and the emotional or psychological trauma to the child if required to testify in open court or to be brought into the personal presence of the alleged perpetrator." § 491.699.2. The in-camera recording can then be used as substantive evidence and is "admissible in lieu of the child's personal appearance and testimony at juvenile court hearings." § 491.699.1-.2. The section allows the court to preside over the depositions, "conducted in accordance with the rules of evidence applicable to civil cases[.]" and allows the attorney for the alleged perpetrator to have "at least two opportunities to cross-examine the deposed alleged child victim." § 491.699.3-.4.

prior chance to cross-examine the witness. *Crawford*, 541 U.S. at 68. In this case, the circuit court made no finding as to the unavailability of any witness.

It is unclear whether the COVID-19 pandemic generally could satisfy the "important public policy" standard under *Craig*. Further, even if we assume the existence of COVID-19 could satisfy the "important public policy" standard, the circuit court would still be required to make witness-specific findings to determine it was necessary for a particular witness to testify via two-way video due to an enhanced risk associated with COVID-19. The existence of multiple viable alternatives in this case, including issuing another continuance or reducing the number of people in the courtroom, suggests even that finding may have been insufficient to support the necessity prong of *Craig*.

None of the circuit court's general statements concerning COVID-19 satisfy the requisite standard for either S.V.'s mother's testimony or S.V.'s babysitter's testimony. In this case, no evidence whatsoever was presented to the circuit court concerning the particular risks facing S.V., S.V.'s mother, or the other witnesses who testified on behalf of the juvenile officer. And the circuit court made no finding that anything about the health or circumstances of these witnesses required they be permitted to testify remotely.

Further, any purported necessity of permitting the juvenile officer's witnesses to testify remotely is undercut by the fact that the circuit judge, the judge's staff, C.A.R.A., and C.A.R.A.'s attorney were all physically present at the courtroom when the witnesses testified. Presumably the circuit court found the safety measures in place in the courtroom to be sufficiently protective to permit several individuals to be present.

Moreover, C.A.R.A.'s adjudication hearing was not subject to the suspension of in-person proceedings covered by this Court's order.

Conclusion

This Court recognizes the devastating toll the COVID-19 pandemic has taken in this country and our state and the substantial impact the pandemic has had on all aspects of society. Nevertheless, generalized concerns about the virus may not override an individual's constitutional right to confront adverse witnesses in a juvenile adjudication proceeding.

The circuit court erroneously declared and applied the law in admitting the two-way video testimony in violation of C.A.R.A.'s right to confrontation. The circuit court's judgment is vacated, and the case is remanded for further proceedings consistent with this opinion.¹⁰

Zel M. Fischer, Judge

All concur.

¹⁰ Because this Court remands, it is not necessary to address C.A.R.A.'s remaining claims on appeal.



SUPREME COURT OF MISSOURI

en banc

May 4, 2020
Effective May 16, 2020

OPERATIONAL DIRECTIVES

As state and local governments begin lifting or relaxing stay-at-home orders and restrictions on social distancing and group gatherings, the Supreme Court of Missouri provides these Operational Directives to the courts of this state to follow before resuming court activities that have previously been suspended by this Court's prior orders. The Court recognizes that conditions vary across the state; therefore, appropriate measures for resuming activities must vary as well. Appropriate precautions and safeguards in large, metropolitan areas may not be necessary or appropriate in less-populated communities. Moreover, differences in docket sizes, courtroom and courthouse layouts, and the number of judicial employees make it difficult to establish functional and effective statewide orders. Accordingly, the purpose of these Operational Directives is to facilitate local solutions appropriate to local conditions.

Nevertheless, Missouri courts must maintain a certain degree of uniformity in our response to the COVID-19 pandemic. Lawyers, litigants, victims, judicial employees, witnesses, jurors, and the public need to know what to expect when they engage with the Missouri judicial system regardless of where that engagement occurs. Accordingly, the purpose of these Operational Directives also is to establish some uniformity in approach among Missouri courts to the challenges created by the COVID-19 pandemic even though the solutions to these challenges may vary from time to time and place to place.

As courts plan and consider gradually resuming activities previously suspended as conditions permit, the presiding judge or chief judge of the applicable circuit or court are directed to adhere to the following Operational Directives. The citizens of the state and employees who enter Missouri courthouses and court facilities must feel confident for their own safety and understand that the health and welfare of every litigant, juror, witness, victim, judicial employee, attorney, and other individual involved in judicial proceedings across the state is paramount in the decisions that are made under these Operational Directives.

As set forth below, Missouri courts have been operating at what is referred to herein as “Operating Phase Zero” since this Court’s March 16, 2020, order suspending most in-person court proceedings. All courts will continue to operate under those conditions until the presiding judge or chief judge of the applicable circuit or court determines – in light of the Gateway Criteria described below – that improvements in local conditions warrant moving to a higher Operating Phase or that deterioration in those conditions necessitates moving to a lower Operating Phase. Each Operating Phase reflects differing approaches to in-person proceedings, personnel and staffing, and courthouse operations. How those approaches will vary depends on local conditions, the needs and rights of the litigants and victims, the physical layouts of court facilities, and the abilities of the judicial and non-judicial personnel. No court can transition beyond the conditions set forth in Operating Phase Three until the Court’s order dated May 4, 2020, is amended or rescinded.

These Operational Directives are designed to assist courts in ensuring public safety when making decisions at the local level. **Accordingly, presiding judges and chief judges should monitor local circumstances and conditions on a regular basis. Any movement to the next higher Operating Phase under these Directives can be made only after a court has been in the prior Operating Phase for a period of at least 14 calendar days. A court may revert back immediately to a prior Operating Phase when local conditions and circumstances require it. Courts must notify the public of any transition to a new Operating Phase in its COVID-19 Notice and send any order or notice to this Court to be included on the Missouri Courts’ website. Prior to changing Operating Phases, the presiding judge or chief judge shall also submit to the Clerk of this Court a notice in the form attached as exhibit A.**

The Court is closely monitoring policy changes recommended by state and local government agencies and the Centers for Disease Control and Prevention (CDC) and will update these Operational Directives as necessary.

Directives

A. Gateway Criteria

Consider each of the criteria below before resuming court activity or progressing to a new Operating Phase:

1. No confirmed COVID-19 cases in the court facility within a 14-day period.
2. Rescission or lack of stay-at-home orders or the relaxing of group gathering restrictions applicable to the community.
3. Improving COVID-19 health conditions over a 14-day period in the community, including conditions such as the number of confirmed COVID-19 cases and related deaths in relation to a community’s population density, size of particularly vulnerable populations, and availability of medical facilities including emergency and intensive care capacity.

4. Consultation with local health officials or departments concerning changes to levels of court and courthouse activities.
5. Consultation with local judiciary partners such as children's division personnel, juvenile officers, members of the local bar, prosecutors and public defenders, law enforcement and probation and parole.

If these Criteria suggest local conditions are improving sufficiently, a presiding judge or chief judge may consider moving to a higher Operating Phase and gradually resuming and adapting previously suspended court activities.

If these Gateway Criteria suggest local conditions are worsening or that there is a resurgence of COVID-19 cases in the community, a presiding judge or chief judge should move to a lower Operating Phase including, when necessary and appropriate, returning to Operating Phase Zero.

B. Operating Phase Approach

1. Based upon the Criteria above, a presiding judge or chief judge may order a change of Operating Phase for each locality either up or down.
2. Any order or decision moving and adapting courthouse operations from one Operating Phase to another must implement appropriate policies protecting litigants, witnesses, victims, judicial employees, attorneys, and other individuals involved in judicial proceedings through:
 - a. Social distancing and/or occupancy rate restrictions;
 - b. A COVID-19 Notice prohibiting access to the premises for individuals who have been exposed to or are exhibiting symptoms of COVID-19, listing necessary contact information for individuals not authorized to enter the premises, and advising those entering a court facility of the social distancing, occupancy rate and other precautionary restrictions taken to protect the health, safety and welfare of occupants;
 - c. The use of masks or face coverings by judicial employees or members of the public;
 - d. Heightened sanitation and disinfection of common and high-traffic areas, including consideration of acquiring additional hand sanitizers and wipes, hand sanitizing stations, and cleaning solutions for court facilities;
 - e. Coordination with supervisors to ensure employees feeling ill stay at home;
 - f. Procedures liberally permitting judicial employees to work from home when appropriate; and
 - g. Preparation for the potential resurgence of COVID-19 cases following the resumption of court activities.

C. Operating Phase Zero

1. Consult with local judiciary partners and rely on local health officials or departments and CDC guidance to adapt court operating decisions to local health conditions.
2. Suspend all in-person court proceedings consistent with the Court's April 17, 2020, Order.

The suspension of in-person proceedings is subject to the following exceptions:

- Proceedings necessary to protect the constitutional rights of criminal defendants, including the right to a speedy trial, and the rights afforded under section 544.676.3;
- Proceedings pursuant to chapters 210 and 211 pertaining to juvenile delinquency and abuse, neglect, and termination of parental rights;
- Proceedings pursuant to chapter 453 pertaining to adoption;
- Proceedings in which civil or criminal jury trials are already in progress as of March 16, 2020;
- Proceedings pursuant to chapter 455 pertaining to orders of protection;
- Proceedings related to emergency child custody orders;
- Proceedings related to petitions for temporary restraining orders or other forms of temporary injunctive relief;
- Proceedings related to emergency mental health orders;
- Proceedings pursuant to Chapter 475 for emergency guardianship or conservatorship;
- Proceedings directly related to the COVID-19 public health emergency;
- Oral arguments regarding time-sensitive matters; and
- Other exceptions approved by the Chief Justice of this Court.

Courts may set in-person hearings in the above listed proceedings but it does not mandate a judge set a hearing in any individual case. The presiding judge of each circuit court and the chief judges of each appellate court are authorized to determine the manner in which the listed in-person exceptions are to be conducted. Such proceedings shall be limited to the attorneys, parties, witnesses, security officers, and other individuals necessary to the proceedings as determined by the judge presiding over the proceedings. The judge presiding over such proceedings has the discretion to excuse jurors or other individuals who cannot or should not appear as a result of risks associated with COVID-19.

3. All proceedings that do not require in-person appearances of parties or counsel are not suspended and may continue in the manner and at the discretion of the judge in the matter as circumstances allow.

4. Encourage judges and court staff to continue utilizing all available technologies – including teleconferencing and video conferencing – whenever possible to limit in-person courtroom appearances to the extent not prohibited by constitutional or statutory provisions.
5. Implement appropriate levels of screening where possible at court facility entrances to mitigate against individuals experiencing symptoms related to COVID-19 from entering court facilities. Such screening may include temperature checks and screening questions.
6. Suspend any non-essential travel by judicial employees for work-related functions.

Continually reevaluate the Gateway Criteria for indications that a courthouse is ready to move to a different Operating Phase.

D. Operating Phase One

1. Continue to consult with local judiciary partners and rely on local health officials or departments and CDC guidance to adapt court operating decisions consistent to local health conditions.
2. Reexamine and update local court orders and COVID-19 Notices as appropriate.
3. Consider resuming only the most critical in-person proceedings and restrict grand and petit jury proceedings to only the most extraordinary, pressing, and urgent cases. (Operational Directives on conducting jury proceedings will be forthcoming from this Court as pandemic and health conditions improve.)
4. Large venues and common areas such as break rooms should be closed. Keep occupancy rates in courtrooms, jury assembly rooms, and other areas in the court facility to an occupancy rate of 10 or less whenever possible and operate under strict social distancing protocols. Consider requiring the use of masks or face coverings. Require tape or other visible means be used to demark six-foot distances where practical. Allow vulnerable¹ litigants, witnesses, victims, attorneys, and other individuals involved in court proceedings to participate in the proceedings remotely or continue or postpone their required presence at the court facility.
5. Encourage judges and court staff to continue utilizing all available technologies – including teleconferencing and video conferencing – whenever possible to limit in-person courtroom appearances to the extent not prohibited by constitutional or statutory provisions.

¹ Vulnerable individuals are defined by the CDC as individuals 65 years or older or individuals with underlying medical conditions, particularly if not well controlled, including those who suffer from chronic lung disease, moderate to severe asthma, serious heart conditions, immune disorders, obesity, diabetes, or chronic kidney or liver disease.

6. Suspend any non-essential travel by judicial employees for work-related functions.
7. Implement appropriate levels of screening where possible at court facility entrances to mitigate against individuals experiencing symptoms related to COVID-19 from entering court facilities. Such screening may include temperature checks and screening questions.
8. Increase cleaning and disinfection of common areas and consider providing hand sanitizers and wipes.
9. Vulnerable judicial employees should work with supervisors to stay at home. Employees who live with or provide care for vulnerable individuals should do the same to the greatest extent possible to reduce chances that they could carry the virus to those vulnerable individuals.
10. Judicial employees should observe at least a six-foot minimum physical distance from others in all offices, meetings, and court proceedings. Require tape or other visible means be used to demark six-foot distances where practical. Additional precautions such as requiring masks or face coverings should be considered.
11. Allow judicial employees to work in shifts whenever possible and feasible to keep staffing levels to a bare minimum to support court activity.
12. Allow judicial employees to stay home where possible if the employee:
 - a) Is subject to a quarantine or isolation order or is living with or caring for such an individual;
 - b) Has been advised by a health care provider to self-quarantine or is living with or caring for an individual who has been advised to self-quarantine;
 - c) Is considered high risk based on local or state health officials or departments criteria for contracting COVID-19, or is living with or caring for such an individual;
 - d) Is experiencing symptoms of COVID-19 and seeking medical diagnosis, or is living with or caring for such an individual; or
 - e) Is caring for a child whose school or place of care has been closed or whose childcare provider is unavailable due to COVID-19 precautions.

A court cannot proceed to Operating Phase Two until it has completed at least 14 days in Operating Phase One. Before proceeding to Operating Phase Two, a court must reevaluate the Gateway Criteria to ensure readiness to progress to the next Operating Phase.

E. Operating Phase Two

1. Continue to consult with local judiciary partners and rely on local health officials or departments and CDC guidance to adapt court operating decisions to local health conditions.
2. Reexamine and update local court orders and COVID-19 Notices as appropriate.
3. Increased in-person court proceedings, including the most extraordinary, pressing, and urgent grand and petit jury proceedings, can begin where they can safely be conducted in compliance with social distancing protocols and occupancy rate limitations applicable to the local community. (Operational Directives on conducting jury proceedings will be forthcoming from this Court as pandemic and health conditions improve.)
4. Keep occupancy rates in large venues and common areas such as courtrooms, jury assembly rooms, jury deliberating rooms, break rooms, and other areas in court facilities to an occupancy rate of 25 or less whenever possible and operate under social distancing protocols. Consider requiring the use of masks or face coverings. Require tape or other visible means be used to demark six-foot distances where practical. Continue to allow vulnerable litigants, witnesses, victims, attorneys, and other individuals involved in court proceedings to participate in the proceedings remotely or postpone their required presence at the court facility.
5. Continue to encourage judges and court staff to utilize all available technologies – including teleconferencing and video conferencing – whenever possible to limit in-person courtroom appearances to the extent practicable and not prohibited by constitutional or statutory provisions.
6. Continue to suspend any non-essential travel by judicial employees for work-related functions.
7. Continue to implement appropriate levels of screening at court facility entrances to mitigate against individuals experiencing symptoms related to COVID-19 from entering court facilities. Such screening may include temperature checks and screening questions.
8. Continue increased cleaning and disinfection of common areas and consider providing hand sanitizers and wipes.
9. Continue to allow vulnerable judicial employees to work with supervisors to establish reasonable accommodations for those vulnerabilities.
10. Judicial employees, when in the court facility, should continue to maximize physical distance from others. Six foot distancing should continue to be observed in all offices, meetings, and court proceedings. Require tape or other visible means be used to demark six-foot distances where practical. Additional precautions such as requiring masks or face coverings should be considered.

11. Continue to allow judicial employees to work in shifts whenever possible and feasible to keep staffing levels to a bare minimum to support increased court activity.
12. Allow judicial employees to stay home if the employee:
 - a) Is subject to a quarantine or isolation order or is living with or caring for such an individual;
 - b) Has been advised by a health care provider to self-quarantine or is living with or caring for an individual who has been advised to self-quarantine;
 - c) Is considered high risk based on local or state health official or department criteria for contracting COVID-19, or is living with or caring for such an individual; or
 - d) Is experiencing symptoms of COVID-19 and seeking medical diagnosis, or is living with or caring for such an individual.

A court cannot proceed to Operating Phase Three until it has completed at least 14 days in Operating Phase Two. Before proceeding to Operating Phase Three, a court must reevaluate the Gateway Criteria to ensure readiness to progress to the next Operating Phase.

F. Operating Phase Three

1. Continue to consult with local judiciary partners and rely on local health officials or departments and CDC guidance to adapt court operating decisions to local health conditions.
2. Reexamine and update local court orders and COVID-19 Notices as appropriate.
3. Resume in-person court proceedings, including grand and petit jury proceedings, that can be conducted in compliance with social distancing protocols and occupancy rate limitations applicable to the local community. (Operational Directives on conducting jury proceedings will be forthcoming from this Court as pandemic and health conditions improve.)
4. Large venues and common areas such as courtrooms, jury assembly rooms, jury deliberating rooms, break rooms, and other areas in the court facility can operate under social distancing protocols. Consider requiring the use of masks or face coverings. Consider continuing to allow vulnerable litigants, witnesses, victims, attorneys, and other individuals involved in court proceedings to participate in the proceedings remotely or continue or postpone their required presence at the court facility.

5. Continue to encourage judges and court staff to utilize all available technologies – including teleconferencing and video conferencing – whenever possible to limit in-person courtroom appearances to the extent not prohibited by constitutional or statutory provisions.
6. Consider terminating enhanced screening procedures at court facility entrances.
7. Continue cleaning and disinfection of common areas and consider providing hand sanitizers and wipes.
8. Allow vulnerable judicial employees to return to work but encourage supervisors to make reasonable accommodations to address those vulnerabilities.
9. Judicial employees should continue to adhere to social distancing guidelines in court facilities. Additional precautions such as requiring masks or face coverings should be considered.
10. Consider resuming normal staffing schedules for judicial employees.
11. Consider discontinuing the suspension of non-essential travel by judicial employees for work-related functions.
12. Allow judicial employees to stay home if the employee:
 - a) Is subject to a quarantine or isolation order or is living with or caring for such an individual;
 - b) Has been advised by a health care provider to self-quarantine or is living with or caring for an individual who has been advised to self-quarantine;
 - c) Is experiencing symptoms of COVID-19 and seeking medical diagnosis, or is living with or caring for such an individual.

EXHIBIT A

Notice to the Supreme Court of Missouri of Higher/Lower Operating Phase

I, _____, (presiding judge or chief judge) of
_____ notify the Supreme Court of Missouri that the following will
move to Operating Phase _____ on the ____ day of _____, 2020.

Mark all that apply:

___ Entire Judicial Circuit/Appellate District; or

___ County/Counties of _____ within the Circuit;
and/or

___ Municipal Division(s) of _____ within the Circuit.

Dated: _____

(Presiding Judge or Chief Judge)

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
16TH JUDICIAL CIRCUIT, STATE OF MISSOURI**

In Re: Updated Court Operations upon Re-Opening of Courthouses

ADMINISTRATIVE ORDER 2020-084

WHEREAS, the Centers for Disease Control and Prevention have declared that the spread of COVID-19 has become a worldwide pandemic; and

WHEREAS, the State of Missouri, Jackson County and various Mayors of cities in Jackson County have previously entered stay at home Orders and other emergency Orders requiring residents to remain at home except for activities essential to health and safety, and requiring businesses to cease operations unless they are considered essential businesses; and

WHEREAS, the continuing operation of the 16th Judicial Circuit Court (“Court”) has been deemed to be an essential governmental service and therefore, the Court has remained open and operational during the term of all Stay-At-Home Orders, performing core judicial functions, often through remote technologies including video and telephone hearings and conferences; and

WHEREAS, the previously entered stay at home Orders and emergency Orders have been lifted or terminated and/or have been replaced with Orders allowing for the phased and gradual re-opening of society, businesses, communities and the courthouses in which the Court operates, while also including restrictions to minimize the potential spread of COVID-19; and

WHEREAS, the Missouri Supreme Court has issued several Orders regarding court operations, the most recent of which includes Operational Directives related not only to considering strategies to prevent the spread of COVID-19, but also directives which provide for a phased approach toward easing restrictions related to court operations, with a clear intent to move toward more complete court operations; and

WHEREAS, notwithstanding the Court commencing a slow, deliberate plan moving toward more complete court operations pursuant to Missouri Supreme Court Orders, the Court’s operations will continue to be significantly modified; and

WHEREAS, circumstances regarding COVID-19 have changed dramatically since the Court’s issuance of prior Administrative Orders related to court operations; and

WHEREAS, it has been and continues to be imperative that the Court take steps to protect the health and safety of employees of the Court, all judicial officers, all attorneys, all litigants, all victims, all witnesses, any other individuals or entities who have cases and hearings before the Court and all members of the general public who interact with or have business with the Court; and

WHEREAS, the Missouri Supreme Court has continued to authorize the Presiding Judge of each Circuit to facilitate local solutions regarding the continuation and/or restoration of court operations, while also considering and maintaining a certain degree of uniformity; and

WHEREAS, the Missouri Supreme Court has continued to encourage judges to utilize all available technologies – including teleconferencing and video conferencing – to limit in person courtroom appearances to the extent not prohibited by the constitution or statutes as to the proceedings; and

WHEREAS, the Missouri Supreme Court’s Operational Directives describe criteria to be evaluated and considered regarding the continued operation of the Court as well as the progression or regression to different Phases set forth in the Operating Directives; and

WHEREAS, the 16th Judicial Circuit Court operates in numerous buildings and courthouses, including the Kansas City Courthouse, the Eastern Jackson County Courthouse, the Family Court Divisions at the Family Justice Center, the Albert Riederer Community Justice Complex and the Community Justice Building (herein collectively referred to as the “Court Buildings”); and

WHEREAS, pursuant to Section 478.240.2 R.S.Mo. and Section 15 of the Missouri Constitution, the Presiding Judge has general administrative authority over all judicial personnel and court officials in the Circuit as well as administrative authority over dockets of the Court and the administrative and discretionary authority regarding the manner in which any hearings are conducted in the Court.

IT IS HEREBY ORDERED, effective immediately and continuing until rescinded, amended, modified or extended in a subsequent Administrative Order, as follows:

1. The Court will follow the Operational Directives and criteria set forth by the Missouri Supreme Court as it works toward restoration of court operations, including the utilization of local solutions appropriate to local conditions.

2. The Court will submit to the Missouri Supreme Court in a regular and timely manner, “Exhibit A, Notice to the Supreme Court of Missouri of Higher/Lower Operating Phase” as set forth in and referenced in the Supreme Court’s Order dated May

4, 2020, effective May 16, 2020. The Court will follow the applicable guidelines and directives for the Phase specified in its submitted Exhibit A, supplemented by the specific terms of this Administrative Order and any amendments hereto. To the extent this Administrative Order provides local solutions or additional terms unique to the local conditions presented to the Court, those solutions and terms shall continue to apply until rescinded or modified by a subsequent Administrative Order.

3. The Court shall continue to utilize all available technologies, including teleconferencing and video conferencing, to the greatest possible extent for all proceedings, hearings and/or conferences (collectively referred hereinafter as “proceedings”) so as to not require the physical presence of persons in Court Buildings. The Court will limit in person proceedings as much as possible.

4. Subject to the provisions of paragraph 3 above, in person proceedings *may resume but only in very limited and extreme circumstances* for critical proceedings in extraordinary and urgent situations, based on a determination that alternative methods for conducting said proceedings cannot occur, including a determination by the Judicial Officer presiding over any such proceedings that it is not possible for such proceedings to be conducted by telephone, teleconference, polycom, videoconferencing, or any other method that does not require the physical presence of persons in Court Buildings. *In person hearings should be conducted only as a last resort* when all other alternative methods to proceed have failed.

5. The Court Administrator has previously established procedures for pro se litigants to deliver and/or file pleadings and other documents with the Court via fax filing, email filing, and by creating drop boxes at designated entries to Court Buildings. Those procedures are posted on Court Building doors, posted on the Court’s website at www.16thcircuit.org, and posted on the Court’s Facebook page. Those procedures shall remain in place as alternatives to pro se litigants filing said documents personally at the courthouses.

6. In all criminal cases where the defendant is in detention at the Jackson County Detention Center or otherwise in custody at any other detention center or at any other prison, said defendant shall not be personally transported to or brought into Court Buildings for any hearing or conference. All hearings and conferences regarding any such defendant shall be conducted via teleconference or videoconference, including initial appearance and arraignment hearings.

7. Each Judicial Officer and his/her division staff shall be responsible for notifying all parties and counsel if his/her cases/dockets are being conducted by teleconference, videoconference or the manner in which hearings will be held. Each Judicial Officer and his/her division staff shall also be responsible for re-scheduling new

hearing dates and notifying all parties and counsel of new hearing dates in the event cases cannot be heard as scheduled.

8. The Court may resume scheduling in person hearings on full orders of protection, subject to social distancing requirements, limitations on the size of gatherings as set forth in the applicable Operational Directives and other limitations set forth in this Administrative Order. The in person hearings on full orders of protection that have previously been continued by prior Administrative Orders will be re-scheduled by the Court and if possible, given priority regarding hearing dates. Given the previous suspension of said hearings, all Ex Parte Orders of Protection currently in existence will be extended by operation of this Administrative Order until the full order of protection hearing can be scheduled and actually occurs. In addition, because of the backlog of Order of Protection cases, all Ex Parte Orders of Protection entered subsequent to this Administrative Order which are not able to be heard within 14 days of the entry of the Ex Parte Order, will be extended by operation of this Administrative Order until a full order of protection hearing can be scheduled and actually occurs. Nothing in this Administrative Order bars or prevents holding hearings on full orders of protection via teleconference or videoconference. Therefore, if all parties in a particular case are available to allow said hearing to be conducted via teleconference or videoconference, said hearing shall proceed in that manner.

9. When a defendant in a pending criminal case bonds out of the Jackson County Detention Center, he/she is given a date for his/her initial appearance. Any such date provided to a defendant shall be continued and the initial appearance will be held 90 days after the date provided at the time the defendant bonds out of the detention center.

10. While this Administrative Order remains in effect, judges presiding over a civil or domestic case or matter may exercise their discretion to waive, for good cause shown, any filing deadlines or time limitations set through Missouri's e-filing system or by court order, local rule, or Missouri Supreme Court Rules 41 through 81. This authorization does not apply to any deadline or time limitations set by statute or constitutional provision.

11. The Court Administrator/Deputy Court Administrator may resume programming operated by the Family Court Services, *provided however*, that the resumption of said programming can proceed in compliance with the Operational Directives, social distancing requirements, limitations on sizes of gatherings, other terms of this Administrative Order and guidelines of the Centers for Disease Control and Prevention.

12. All municipal courts in Jackson County, Missouri are subject to this Administrative Order and are encouraged to take appropriate action consistent with this Administrative Order and Centers for Disease Control and Prevention guidelines.

13. The provision of Circuit Court Local Rule 68.3.1 which requires that *each* party be represented by separate counsel, shall remain temporarily suspended. Therefore, assuming all other requirements of Local Rule 68 are complied with, proposed Judgments may be submitted by Joint signed Affidavit and entered by the Court when only one party is represented by counsel instead of the requirement that both parties be represented by counsel. All other terms of Local Rule 68 remain in effect.

14. All nonessential court related travel for staff and judicial officers shall remain suspended.

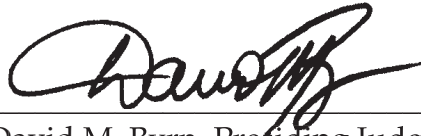
15. All Court staff and all members of the public who appear at any Court Building for hearings and/or to conduct any court-related business, shall comply with all screening requirements and/or other requirements to mitigate against the spread of COVID-19 which are imposed at all Court Buildings, including but not limited to temperature checks and medical screenings in order to enter any Court Building, wearing masks or other face coverings as a condition to enter any Court Building, wearing masks or other face coverings in all public areas in all Court Buildings and social distancing.

IT IS FURTHER ORDERED that to the extent the directives and declarations set forth in this Administrative Order differ with the Court's prior Administrative Orders, this Administrative Order controls.

THIS ORDER MAY BE AMENDED, RESCINDED, MODIFIED OR EXTENDED AS CIRCUMSTANCES REQUIRE.

IT IS SO ORDERED.

May 14, 2020
Date



David M. Byrn, Presiding Judge

Certificate of Service

This is to certify that a copy of the foregoing was emailed to the following on May 14, 2020.

16th Circuit Court Judiciary and Staff
Frank White, County Executive

Troy Schulte, County Administrator
Darryl Forte, Sheriff
Theresa Galvin, Legislative Chair
Members of the Legislature
Mary A. Marquez, Court Administrator
Jean Peters-Baker, Prosecutor
Ruth Petsch, District Defender