Adult Rape Victims Should Be Permitted to Testify by Closed-Circuit Television

Matthew Marthaler

American University Washington College of Law

Follow this and additional works at: https://digitalcommons.wcl.american.edu/clp

Part of the Criminal Law Commons, Law and Gender Commons, and the Law and Society Commons

Recommended Citation
Marthaler, Matthew (2015) "Adult Rape Victims Should Be Permitted to Testify by Closed-Circuit Television," Criminal Law Practitioner. Vol. 3 : Iss. 1 , Article 5. Available at: https://digitalcommons.wcl.american.edu/clp/vol3/iss1/5

This Article is brought to you for free and open access by Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Criminal Law Practitioner by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.
ADULT RAPE VICTIMS SHOULD BE PERMITTED TO TESTIFY BY CLOSED-CIRCUIT TELEVISION

By Matthew Marthaler

I. Introduction

April is eighteen years old and excited to start her life by going to college. However, in her first week of school, she is raped by one of the students – just like 10,237 other female college students aged 18-24 who are raped annually each year in the United States (along with the 7,864 students who are attempted to be raped). The man accused of rape is set to stand trial next week. April’s psychologist examined her and explained to the court that she would suffer serious emotional distress and thus be unable to communicate coherently if she were forced to testify in the presence of the defendant. However, the psychologist explains that April would be able to testify over two-way closed-circuit television (CCTV) with both attorneys and her doctor in the room with her, while the judge, jury, and the defendant watched from another room.

This is not an isolated case, as in 2012, there were 346,830 victims of rape/sexual assault.

Whether the victim may use CCTV has not been determined by the Courts and is still a lingering issue. CCTV is a procedure where the victim, defense attorney, and prosecutor are in a separate room from the defendant while the victim testifies under oath to direct and cross examination as if the victim were in the courtroom. The responses are then contemporaneously transmitted to the courtroom for the judge, jury, and defendant. One-way CCTV has one camera and monitor so that the defendant can see the victim, but the victim cannot see the defendant. Two-way CCTV has two cameras and monitors so that the victim and defendant can see each other on the monitor. There is little guidance from the courts on how to set up CCTV. One court found that the monitor does not need to be directly in the victim’s field of vision while he or she testifies.

Another court held that the cameras need to be positioned so that the jury can see the victim’s face at all times and the victim can see the face of the jurors, defendant, and questioner as he or she testifies. Finally, the Ninth Circuit has held that, “the defendant must be able to communicate with his or her attorney instantly during the deposition.”

4 Id.
5 United States v. Etimani, 328 F.3d 493, 501 (9th Cir. 2003).
7 United States v. Miguel, 111 F.3d 666, 670.
In this paper, I will discuss the Confrontation Clause of the Sixth Amendment of the United States Constitution and how it applies to the use of CCTV currently. I will then explain how the use of CCTV should be allowed for adults who are rape victims. In conclusion, I will construct and propose a new rule regarding televised testimony of adult rape victims.

II. The Confrontation Clause

The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .” This clause has been interpreted in two different ways, with the most recent interpretation in 2004. The first interpretation dealt with applying the clause to hearsay testimony in the 1980 Supreme Court case of Ohio v. Roberts. Here, the Court ruled “that the Confrontation Clause reflects a preference for face-to-face confrontation at trial.” In conformance with this preference for face-to-face confrontation, the Court found that if there is a request for non-face-to-face testimony, there first needs to be a necessity. This requires the counsel to explain the unavailability of the declarant and show a good-faith, diligent effort to secure the live testimony of the hearsay declarant. After a witness is shown to be unavailable, then the hearsay must have particularized guarantees of trustworthiness and an indicia of reliability. The Court determined that this reliability could be inferred where the evidence falls within a firmly rooted hearsay exception. Hence, according to the Court in Roberts, to allow hearsay evidence, there needs to be (1) a showing of unavailability and (2) the statement must bear adequate indicia of reliability.

In the 2004 case of Crawford v. Washington, however, the Supreme Court decided to scrap the unclear standard of reliability. In Crawford, the Court looked into the history to determine how the Confrontation Clause should be applied. The Court used a Supreme Court case from 1895, Matttox v. United States, to state that the Confrontation Clause was meant to prevent depositions or ex parte affidavits from being used against the prisoner instead of cross-examination. Cases before Roberts conformed to the holding that “prior trial or preliminary hearing testimony is admissible only if the defendant had an adequate opportunity to cross-examine.” The Court then found that the Roberts test was too broad because it applied the same mode of analysis whether or not the hearsay consisted of ex parte testimony and that it was too narrow because it admitted some ex parte testimony based on reliability. As a result, the Court

(9th Cir. 1997).
8 U.S. CONST. amend. VI; see also Schaal v. Gammon, 233 F.3d 1103, 1106 (8th Cir. 2000).
10 Id. at 63.
11 See id. at 65.
14 Roberts, 448 U.S. at 66.
15 See id.
17 See generally id. at 50-60; Matttox v. United States, 156 U.S. 237, 242 (1895).
18 Crawford, 541 U.S. at 57 (emphasis added).
19 See id. at 60.
established a new test that followed the history of the Confrontation Clause. This new test states that if ex parte evidence is non-testimonial, then it may properly be excluded within hearsay laws.\(^2\) Moreover, if the ex parte evidence is testimonial, then it may not be introduced unless (1) the witness is shown to be unavailable and (2) the accused has had an opportunity for cross-examination.\(^3\) However, the question of what a testimonial statement is was not defined.\(^2\) Even though a testimonial statement was not defined, Justice Scalia’s guidance in the Crawford opinion, the Supreme Court’s opinion in Davis v. Washington, and the Central District of California’s opinion in Howard v. Felker show that a testimonial statement is one that is directed toward proving a fact, and not just a casual remark.\(^2\)

The importance of cross-examination to the adversarial process in a criminal trial cannot be overstated.\(^4\) To be sure, the Confrontation Clause’s main goal was to ensure the reliability of evidence.\(^5\) However, the Confrontation Clause is now seen as a “procedural rather than a substantive guarantee.”\(^6\) The Clause does not command that the evidence be reliable, but that the reliability of the evidence be assessed by testing, through the crucible of cross-examination.\(^7\) The Clause thus ensures that the witness will give his or her testimony under oath because the witness will see that lying while under oath could result in jail time.\(^8\) The clause also forces the witness to submit to cross-examination, which is a great tool in determining the truth and getting reliable evidence.\(^9\)

III. The Confrontation Clause and the Use of CCTV for Child Victims of Sexual Assault

When it comes to allowing CCTV in cases where children are victims of sexual assault, two main cases, Coy v. Iowa and Maryland v. Craig, determined the applicability of the Confrontation Clause.\(^10\) In Coy, which was decided prior to Crawford, the Court determined that the Confrontation Clause grants a criminal defendant the right to be confronted with the witnesses who are testifying against him.\(^11\) This right to confront meant a right to a face-to-face encounter between the witness and the accused.\(^12\) Importantly though, the Court found that the rights within the Confrontation Clause are not absolute and may give way when necessary to further an important public policy.\(^13\) In Coy, two thirteen-year-old girls were camping in their backyard when an assailant entered their tent.\(^14\) At trial, the State asked for CCTV or a screen to be placed between the appellant and witness, the latter of which the trial Court agreed to.\(^15\) However, the Supreme Court held that there were no individualized findings that it was necessary for the children to receive special protection from the

---

20 See id. at 68.
22 See Crawford, 541 U.S. at 68.
23 See id. at 51; see Davis, 547 U.S. at 824; see Howard v. Felker, No. CV 08–4135 MWF (JC), 2013 WL 1912476, at *11 (C.D. Cal. March 14, 2013).
27 See Crawford, 541 U.S. at 61; see Haliym, 492 F.3d at 701; see also Mendez v. Ochoa, No. CV 12–2122 JAK (JC), 2015 WL 1809140, at *6 (C.D. Cal. April 17, 2015) (finding that the purpose of confrontation is to secure for the opponent the opportunity of cross-examination).
28 See Haliym, 492 F.3d at 701.
29 See id.
31 See Coy, 497 U.S. at 1015.
32 See id. at 1016-18.
33 See id. at 1020-21.
34 See id. at 1014.
35 See id.
defendant and thus, the defendant’s right to face-to-face confrontation was violated.\textsuperscript{36} As a result, the question of whether there were any exceptions that could outweigh the Confrontation Clause interest was left for another day.\textsuperscript{37}

Two years after Coy, the Supreme Court answered this question in Maryland v. Craig. In this case, Craig was charged and was tried for sexual abuse of a six-year-old child.\textsuperscript{38} The state asked for and was allowed one-way CCTV because the child would suffer emotional distress if required to testify in the courtroom.\textsuperscript{39} This was appealed for violation of the Confrontation Clause, but the Court ruled that there was no violation.\textsuperscript{40} The Court reasoned that although Coy held that “the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact,” there was never a guarantee for criminal defendants to have an absolute right to a face-to-face meeting with the witness.\textsuperscript{41} Furthermore, the Court determined that 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.”\textsuperscript{42} Applying this, Craig set forth a two-part test for determining whether an exception to the Confrontation Clause’s face-to-face requirement is warranted: “A defendant’s right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where (1) denial of such confrontation is necessary to further an important public policy and (2) only where the reliability of the testimony is otherwise assured.”\textsuperscript{43}

However, Craig was decided before Crawford and the issue is thus whether Crawford changes the test in Craig. Crawford plays a role on hearsay evidence, but the Supreme Court has not has addressed whether the decision in Crawford impacts the holding in Craig and the use of CCTV. Many courts after Crawford, however, still look into reliability when determining if CCTV should be used.\textsuperscript{44} Other courts have ruled that Crawford does not overrule Craig.\textsuperscript{45} Even evidence horbooks state that Crawford does not overrule Craig.\textsuperscript{46} If the Supreme Court were to apply Crawford, maybe they would use a middle-ground as opposed to eliminating the reliability test. This test would allow CCTV if denial of face-to-face confrontation was necessary to further an important public policy, the defendant was given an opportunity to cross-examine the witness, the witness testified under oath, and the fact-finder had an opportunity to observe the witness’s demeanor.\textsuperscript{47} Nonetheless, since there has been no Supreme Court ruling and many cases follow Craig, this memorandum will proceed using the test formulated in Craig without affect from Crawford. Hence, the right to face-to-face confrontation under the Clause is not absolute.\textsuperscript{48} “This face-to-face confrontation can be denied only where the trial court finds (1) that there is an important public policy that will be served by denying physical

---

\textsuperscript{44} See e.g., United States v. De Jesus-Casteneda, 705 F.3d 1117, 1120-21 (9th Cir. 2013); United States v. Mostafa, 14 F. Supp. 3d 515, 518-19 (S.D.N.Y. 2014).


\textsuperscript{46} See Graham, supra note 12, at 269 (stating that the decision in Craig remains largely unaffected by the Crawford decision).


\textsuperscript{48} See, e.g., Hood v. Uchtman, 414 F.3d 736, 738 (7th Cir. 2005); United States v. Gigante, 166 F.3d 75, 80 (2nd Cir. 1999); LaBayre v. Iowa, 97 F.3d 1061, 1062 (8th Cir. 1996); United States v. Gamadonegro, No. CR 09-0312 JB, 2012 WL 400727, at *10 (D.N.M. January 23, 2012).
confrontation, (2) that such denial is necessary to further that policy, and (3) that other measures will ensure the reliability of the testimony.”

This is the case for one-way as well as two-way testimony.

A. Important Public Policy for Child Victims of Sexual Assault

Denying face-to-face controversy must further an important public policy. Craig did not give a framework on to how to determine a public policy and only followed precedent of prior cases which found that “the protection of minor victims of sex crimes from further trauma and embarrassment” is a “compelling” one. However, the Court did state that if a number of states recognize the public policy, then it may be an important policy.

B. Necessity for Child Victims of Sexual Assault

Denial of face-to-face controversy must be necessary to further the public policy. The finding of necessity needs to be case specific where the court hears evidence to determine whether use of CCTV is necessary to protect the particular public policy. Thus, for the welfare of children public policy, there needs to be case specific evidence that CCTV will protect children from further traumatization. For the welfare exception, the court must

also find that the child would be traumatized by testifying in the presence of the defendant and that the distress is not de minimus.

C. Reliability for Child Victims of Sexual Assault

The reliability of the testimony must be otherwise assured in the absence of face-to-face confrontation. For this prong, reliability is assured by providing the defendant with the right of cross-examination; by requiring the witness to give statements under oath; and by providing the jury, judge, and defendant an opportunity to assess the demeanor and, hence, the credibility of the witness. Accordingly, since the child witness in Craig testified under oath, was subject to cross-examination, and was observed for demeanor, the reliability of the evidence was assured.

IV. 18 U.S.C. § 3509 – The Victims of Child Abuse Act

“Spurred by Craig, Congress passed the

2004).

56 See Craig, 497 U.S. at 856; see United States v. Moses, 137 F.3d 894, 897-900 (6th Cir. 1998); see United States v. Garcia, 7 F.3d 885, 887-88 (9th Cir. 1993).

57 See Craig, 497 U.S. at 856; see also Susan Howell Evans, Note, Criminal Procedure-Closed Circuit Television in Child Sexual Abuse Cases: Keeping the Balance Between Realism and Idealism—Maryland v. Craig, 26 WAKE FOREST L. REV. 471, 495 (1991) (noting that this third prong of the Craig rule is most problematic because the Court did not try to set guidelines “as to what degree of trauma constitutes more than ‘de minimis’”).

58 See e.g., Craig, 497 U.S. at 850 (finding that the denial of confrontation must further an important public policy to allow the court to rely on testimony other than face-to-face testimony); De Jesus-Casteneda, 705 F.3d at 1120 (noting that courts should consider state interests and reliability)


60 See Craig, 497 U.S. at 857.
V. Allowing Adult Rape Victims to Testify by Means of CCTV

Craig and many of the cases that followed it, as well as 18 U.S.C. § 3509, deal solely with allowing children to use CCTV. Although the Supreme Court has never answered the question of whether adults can use CCTV based on the Craig standard, it recognizes that this question is an important one. However, Craig’s references to “an important public policy” can be applied to more policies besides protecting children from emotional trauma. Even the statute can be helpful as it can be used to show that other policies are important, such as not allowing for intimidation. Hence, this section will first discuss whether adult witnesses can use CCTV at all based on the framework of Craig (where public policy, necessity, and reliability is needed to pass the Confrontation Clause) and 18 U.S.C. § 3509. It will then detail why adults should be able to use CCTV if they are rape victims.

A. Should adults even be able to use CCTV at all?

Before this paper discusses if adults should be able to use CCTV when they are rape victims, it must first be determined if adults may use CCTV. The main question to ask is whether there is a sufficiently important public policy which is furthered by allowing adults to use CCTV. Nowhere does Craig suggest that an important public policy is limited to child witnesses or that the public policy must be codified. In fact, multiple state and federal courts have read Craig’s references to “an important public policy” as suggesting that the general rule which allows for non-face-to-face confrontation is not limited to protecting child victims of sexual offenses from the trauma of testifying in a defendant’s presence. Hence, the Confrontation Clause is not

V. Allowing Adult Rape Victims to Testify by Means of CCTV

Craig and many of the cases that followed it, as well as 18 U.S.C. § 3509, deal solely with allowing children to use CCTV. Although the Supreme Court has never answered the question of whether adults can use CCTV based on the Craig standard, it recognizes that this question is an important one. However, Craig’s references to “an important public policy” can be applied to more policies besides protecting children from emotional trauma. Even the statute can be helpful as it can be used to show that other policies are important, such as not allowing for intimidation. Hence, this section will first discuss whether adult witnesses can use CCTV at all based on the framework of Craig (where public policy, necessity, and reliability is needed to pass the Confrontation Clause) and 18 U.S.C. § 3509. It will then detail why adults should be able to use CCTV if they are rape victims.

A. Should adults even be able to use CCTV at all?

Before this paper discusses if adults should be able to use CCTV when they are rape victims, it must first be determined if adults may use CCTV. The main question to ask is whether there is a sufficiently important public policy which is furthered by allowing adults to use CCTV. Nowhere does Craig suggest that an important public policy is limited to child witnesses or that the public policy must be codified. In fact, multiple state and federal courts have read Craig’s references to “an important public policy” as suggesting that the general rule which allows for non-face-to-face confrontation is not limited to protecting child victims of sexual offenses from the trauma of testifying in a defendant’s presence. Hence, the Confrontation Clause is not

V. Allowing Adult Rape Victims to Testify by Means of CCTV

Craig and many of the cases that followed it, as well as 18 U.S.C. § 3509, deal solely with allowing children to use CCTV. Although the Supreme Court has never answered the question of whether adults can use CCTV based on the Craig standard, it recognizes that this question is an important one. However, Craig’s references to “an important public policy” can be applied to more policies besides protecting children from emotional trauma. Even the statute can be helpful as it can be used to show that other policies are important, such as not allowing for intimidation. Hence, this section will first discuss whether adult witnesses can use CCTV at all based on the framework of Craig (where public policy, necessity, and reliability is needed to pass the Confrontation Clause) and 18 U.S.C. § 3509. It will then detail why adults should be able to use CCTV if they are rape victims.

A. Should adults even be able to use CCTV at all?

Before this paper discusses if adults should be able to use CCTV when they are rape victims, it must first be determined if adults may use CCTV. The main question to ask is whether there is a sufficiently important public policy which is furthered by allowing adults to use CCTV. Nowhere does Craig suggest that an important public policy is limited to child witnesses or that the public policy must be codified. In fact, multiple state and federal courts have read Craig’s references to “an important public policy” as suggesting that the general rule which allows for non-face-to-face confrontation is not limited to protecting child victims of sexual offenses from the trauma of testifying in a defendant’s presence. Hence, the Confrontation Clause is not
violated if an important public policy for an adult to use CCTV is identified and the other safeguards of *Craig* are followed.\(^6\) The finding of a public policy is not set at an exceptionally high threshold.\(^6\) Sufficient public policy exists when the policy is at least comparable to the State’s interest in protecting the victims of child abuse from further injury.\(^7\) Once a policy is found, then the denial of face-to-face confrontation needs to meet the other elements established in *Craig*. This includes that the denial be necessary to promote an important public policy and the testimony be reliable. This section will first discuss the different important public policies for adult witnesses to deny direct confrontation and then explain how necessity and reliability can be met for CCTV.

i. **Policies for adults who are not rape victims that have been held to be sufficient for adults to use CCTV.**

Many courts have been able to find different public policies that meet the threshold of being at least comparable to the State’s interest in protecting the victims of child abuse from further injury. Although the Supreme Court has yet to rule on any policy allowing adults to use CCTV, the vast amount of courts and jurisdictions that agree on these policies show that these public policies are important and sufficient.

a. **Public policy to allow adults to use CCTV due to a witness’ illness or injury.**

According to some courts, illness or injury of a witness can lead to a sufficient public policy to satisfy *Craig* and allow for adults to use CCTV (as long as the other prongs of *Craig* are satisfied).\(^7\) For example, in *Bush v. State*, the witness lived out of the state and could not attend trial due to his congestive heart failure.\(^7\) The Supreme Court of Wyoming held that allowing the witness to testify “via video conference was necessary to further the important public policy of preventing further harm to his already serious medical condition.”\(^7\) Similarly, in *Turner v. Crews*, the witness had a health condition which rendered it “virtually impossible and very costly for him to personally appear at trial.”\(^7\) The Court thus ruled that CCTV should be provided for the witness to prevent further harm and to provide the jury with evidence to justly resolve the case.\(^7\) Additionally, there are several more cases where public policies of preventing further harm and accommodating for injured witnesses are implicated by a key witness too ill to appear in court.\(^7\)

---


\(^7\) See United States v. West, No. 08 CR 669, 2010 WL 3324886, at *2 (N.D. Ill. Aug. 18, 2010) (finding that applying terrorism as the standard is too high a threshold for an exception under *Craig*).

\(^7\) See Collins, 2013 WL 4891923, at *13 (citing Brumley v. Wingard, 269 F.3d 629, 644 (6th Cir. 2001)).
b. **Public policy to allow adults to use CCTV when a witness resides in a foreign country beyond the state’s subpoena power.**

According to some courts, there is a sufficient public policy to allow for adults to use CCTV when necessary to allow the witness to testify when the witness resides in a foreign country beyond the state’s subpoena power.\(^{77}\) Most courts, however, seem to require some impediment to testifying beyond mere unwillingness to travel.\(^{78}\) In *Harrell v. Butterworth*, the witnesses lived in Argentina, which was beyond the subpoena power of the court.\(^{79}\) One witness was also in such poor health that she could not travel to the United States.\(^{80}\) The Court thus held that the witnesses could use CCTV as there is an important public policy to “expeditiously and justly resolve criminal matters that are pending in the state court system” and there was no way to compel the witnesses to attend trial.\(^{81}\) This was combined with the policy of preventing further injury to the witnesses who were in bad health.\(^{82}\) In contrast, in *United States v. Yates*, the witnesses lived in Australia and refused to come to the United States to testify.\(^{83}\) The Court found that CCTV is proper when there is an important public policy of expeditiously resolving matters and when the witness is out of the state’s subpoena power, but held that more was necessary than just an unwillingness to travel.\(^{84}\) Finally, in *United States v. Mostafa*, the Court ruled that since the witness would be arrested if he left the United Kingdom, then he could use CCTV as it furthered a public policy to justly resolve criminal matters when the witness is unavailable and outside subpoena powers.\(^{85}\)

**c. Public policy to allow adults to use CCTV due to a witness being intimidated by the defendant.**

Witness intimidation is a big problem in that it is disruptive of the administration of justice.\(^{86}\) Courts are thus justifiably worried that witnesses who are intimidated will not provide reliable testimony.\(^{87}\) Therefore, there is a sufficient public policy to allow adults to use CCTV when necessary to further the public policy of justly resolving the criminal case, while at the same time protecting the well being of the state’s witnesses from harm and intimidation.\(^{88}\)

d. **Other public policies that allow adults to use CCTV.**

---

77 See *State v. Rogerson*, 855 N.W.2d 495, 506-07 (Iowa 2014).
78 See id.; but see *F.T.C. v. Swedish Match North America, Inc.*, 197 F.R.D. 1, 2 (D.D.C. 2000) (holding that there is a public interest for use of CCTV when witness would have to travel across the continent and requiring no other impediment).
80 See id.
81 See id.
82 See id.
83 *United States v. Yates*, 438 F.3d 1307, 1310 (8th Cir. 2006).
84 See id. at 1315-16.
87 See id.
88 See id. at *21.
There is a sufficient public policy to allow adults to use CCTV when necessary to protect physical abuse victims.\textsuperscript{89} Separately from protection for abuse victims, there is a significant public policy “to expeditiously and justly resolve criminal matters.”\textsuperscript{90} This policy usually needs to be combined with another policy (such as protecting witness who has an illness or who cannot travel).\textsuperscript{91}

ii. \textbf{Necessity and reliability are still required for adults to use CCTV}

In order for an adult to use CCTV, he or she still needs to satisfy the necessity and reliability prongs of \textit{Craig}.\textsuperscript{92} Necessity requires that some evidence be presented that shows the witness needs CCTV.\textsuperscript{93} Reliability is usually not too difficult to satisfy. Reliability is met if the adult witness giving CCTV testimony has been sworn, he or she is subject to cross-examination, he or she testified in the full view of the jury, court, and defense counsel, and he or she gave testimony under the eye of the defendant.\textsuperscript{94} Therefore, since the courts have ruled that adult witnesses can use CCTV if the elements of \textit{Craig} are met, this opens up the door for CCTV to be used for an adult witness who is a rape victim.

B. \textbf{Why CCTV should be used for adults who are rape victims}

Adult witnesses who are rape victims should be able to use CCTV if they meet all of the elements established in \textit{Craig}. This includes requiring CCTV to be necessary and in furtherance of an important public policy as well as ensuring that the testimony is reliable.\textsuperscript{95} In this part, I will first explain why protecting adults from further traumatization due to testifying in a defendant’s presence is a significant public policy. I will then discuss some cases that have scratched the surface of allowing adults who are rape victims to use CCTV when necessary to protect them from further traumatization. Finally, I will show that allowing adults to use CCTV can still satisfy the elements of necessity, public policy, and reliability and thus surpass the Confrontation Clause.

i. \textbf{Protecting adult rape victims from further traumatization due to testifying in a defendant’s presence is a significant public policy.}

The question of whether an adult rape victim who would be emotionally traumatized by testifying in the presence of the alleged rapist can be afforded CCTV has not been looked at by many courts. This question depends in part on whether protecting adult rape victims from further trauma is an important public policy; however, as will be explained later, there may be other polices for adults to use CCTV. One fact that is not disputable though is that rape is a serious problem in the United States. The U.S. Department of Justice and the Centers for Disease Control and Prevention estimated that around 15% of U.S. women have been raped in their lifetimes.\textsuperscript{96} In a hearing before the United States Senate, a study from 2005 was cited and demonstrated that there were roughly over

\begin{itemize}
\item \textsuperscript{89} \textit{People v. Williams}, 125 Cal. Rptr. 2d 884, 893 (Cal. Ct. App. 2002).
\item \textsuperscript{90} \textit{See, e.g.}, \textit{Harrell v. Butterworth}, 251 F.3d 926, 931 (11th Cir. 2001); \textit{Johnson}, 2014 WL 4829592, at *17.
\item \textsuperscript{91} \textit{See id.}
\item \textsuperscript{92} \textit{See United States v. Gigante}, 166 F.3d 75, 80 (2d Cir. 1999).
\item \textsuperscript{93} \textit{See State v. Rogerson}, 855 N.W.2d 495, 507 (Iowa 2014).
\item \textsuperscript{94} \textit{See, e.g.}, \textit{Harrell}, 251 F.3d at 931; \textit{Gigante}, 166 F.3d at 80; \textit{Stevens v. State}, 234 S.W.3d 748, 782 (Tex. App. 2007).
\item \textsuperscript{95} \textit{See e.g.}, \textit{Craig}, 497 U.S. at 850; \textit{Yates}, 438 F.3d at 1314.
\end{itemize}
800,000 adult women in the United States who were forcibly raped in the year 2004 alone. This same study presented to the Senate explained that rape was not going away as the proportion of adult women in the United States who have been victims of forcible rape had increased over 25% in 2005 than what the proportion was in 1990. However, these numbers are potentially much higher, because some experts estimate that only 15-19 percent of rapes in the United States are reported.

Not only is rape prevalent in the United States, but it is also causing significant psychological problems for many, if not all, of the victims. A common occurrence for rape victims is Post Traumatic Stress Disorder (PTSD). Dr. Fiona Mason, a forensic psychiatrist at Saint Andrew’s Hospital Northampton, has stated that “[i]n the early weeks after sexual assault most people . . . express a range of post-traumatic symptoms . . . [which] include anxiety, tearfulness, self blame and guilt, disbelief, physical revulsion and helplessness.” The medical community refers to this PTSD as rape trauma syndrome and reactions from being raped can also include extreme fear, humiliation, and anger. Most people that experience these problems still have them after a long time since the rape. Testing about the rape and facing the rapist in court can also add to the already devastating emotional damages the victim has. Testifying in front of the rapist makes victims face the person who they may greatly fear, leading some to feel as though the sexual assault is recurring to which they re-experience terror and humiliation.

Due to the high number of rape victims and the PTSD associated with rape, it can be seen that this is a significant social and health problem in the United States that should be corrected. One way to fix it is to have more convictions of the actual perpetrators to instill a greater deterrence. However, this requires more than 19% of the victims to report when they have been victims of rape. This may be achieved by allowing adult victims to use CCTV so he or she will not be afraid of reporting the crime and testifying in court. Therefore, because Craig and 18 U.S.C. § 3509 allow for children of rape to use CCTV if there is a substantial likelihood of emotional trauma from testifying (along with necessity and reliability), the same should be allowed for adult victims. Adults do have emotional trauma due to testifying in front of the

---

97 Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases: Hearing before the Subcomm. on Crime and Drugs & the S. Comm. on the Judiciary, 111th Cong. 87 (2010) (statement of Dean G. Kilpatrick, Professor of Clinical Psychology at the Medical University of South Carolina).

98 Id. at 27, 86-87.


100 See Yxta Maya Murray, Rape Trauma, the State, and the Art of Tracey Emin, 100 CALIF. L. REV. 1631, 1639-40 (2012) (discussing the psychological issues that come after being a victim of rape).


102 Jan Welch & Fiona Mason, Rape and Sexual Assault, 334 BRIT. MED. J. 1154, 1157 (2007).


105 See Thielmeyer, supra note 102, at 811.

106 See Jim Parsons and Tiffany Bergin, The Impact of Criminal Justice Involvement on Victims’ Mental Health, 23 J. TRAUMATIC STRESS 182, 182-84 (2010); Garvin et al., supra note 100, at 1-2.

defendant. So, just as a child, we need to protect adult victims to help them recover, to protect them from more trauma by having to face the defendant, and also to give them more incentive to go to court and receive justice. Thus, protecting adult victims from further emotional trauma due to testifying in front of the defendant is a significant public interest to allow for adults to use CCTV.

There are also different laws and programs in the United States, which show that protecting the rape victim from embarrassment and trauma is a significant public policy. First, there are the rape shield laws. Before rape shield laws were in place, defense attorneys at trial could cross-examine the victim on his or her past sexual history and cause needless psychological or emotional abuse. The admission of such evidence caused the victims who testified to experience trauma and contributed to their reluctance to report and testify about rape. In response to this practice, demands for the protection of victims against the trauma and humiliation at trial were called for and legislatures started to pass rape shield laws in the 1970s. The federal version of the rape shield law, Federal Rule of Evidence 412, was passed in 1978 and gave victims of rape additional protections outside of the exception to the character evidence rule. These federal and state rape shield laws were questioned in court, but ultimately, they withstood constitutional scrutiny. This can be attributed to the fact that the laws protected rape victims from embarrassment and trauma, which was found to be a sufficiently important public policy as it lead to the encouragement of rape victims to report the crime. Thus, protecting adult victims from trauma and distress due to testifying face-to-face with the alleged rapist must also be an important public policy.

The increasing amount of rape/sexual assault victim-oriented programs and task forces also shows that protecting the rape victim from embarrassment and trauma is a significant public policy. The creation of rape crisis centers and other programs over the country have enhanced the quality of victim health care, made victim’s needs a priority, and improved prosecution rates. These programs also show that communities support a public policy of minimizing emotional and physical suffering of rape victims while also garnering more convictions against perpetrators.

Even more, several states have statutes that allow adult victims of sexual and physical abuse to

---

108 Garvin et al., supra note 100, at 1.
110 See id. at 957.
111 See Thielmeyer, supra note 102, at 811-12.
112 See id.
113 See id. at 813 (citing Doe v. United States, 666 F.2d 43, 48 & n.9 (4th Cir. 1981)).
115 Garvin et al., supra note 100, at 4.
117 Garvin et al., supra note 100, at 4.
testify through CCTV. In *Craig*, the Court held that if a number of states recognize the public policy, then it may be an important policy. Accordingly, since there are several states that recognize a public policy to protect adult victims from further trauma, it is now very hard to refute that this is in fact an important policy that should be recognized by all the courts. Furthermore, if protecting witnesses who have an illness, are not within the court’s subpoena power, or are victims of physical abuse are considered important policies by many courts, then protecting the emotional well-being of a victim, which is just as, if not more important, should absolutely be an considered an important policy.

ii. Cases that bolster the belief that protecting adult rape victims from further trauma due to testifying in front of the defendant is a significant public policy to allow CCTV.

Some courts have paved the way for the policy of protecting adult rape victims from further trauma due to testifying in front of the defendant to be seen as significant. In *People v. Burton*, the adult victim was brutally beat and raped. The Court determined that because the manner in which she was assaulted was so horrible, a mentally fit adult "would likely be frightened by the sight and presence of her attacker." Therefore, the Court found that her physical and psychological well-being was "sufficiently important to limit defendant’s right to face his accuser in person and in the same courtroom." Even though the Court held that her well-being was important in part because she was mentally challenged and the act was so ruthless, this case still shows that protecting the psychological well-being of an adult victim may be an important public policy. In another case, *Ex Parte Taylor*, the Texas Criminal Appeals Court ruled that, "[t]he State has an interest in protecting victims of domestic abuse from further trauma caused by testifying against the alleged perpetrator." Hence, even though this case was about domestic abuse, it shows that protecting victims from further trauma is a significant policy and this could easily be applied to rape victims. Other courts have stated that there may be an important public policy in protecting rape victims from further trauma due to testifying in front of the defendant, but there needs to be evidence showing necessity in order to surpass the Confrontation Clause. Thus, all these cases show that protecting adult rape victims from further trauma due to testifying in front of the defendant should be seen as a significant public policy and allow for CCTV as long as the witness also satisfies the elements of necessity and reliability.

iii. Allowing adult rape victims to use CCTV can satisfy the elements of necessity, public policy, and reliability and thus surpass the Confrontation Clause.


119 *Craig*, 497 U.S. at 853.


121 See id. at 205.

122 See id. at 206.


124 See *United States v. Partin*, No. 2:12cr188-MHT, 2014 WL 2831665 at *8-9 (M.D. Ala. June 23, 2014) (holding that even though the testimony may be difficult for adults, the emotional trauma must be due to testifying in the defendant’s presence); *See People v. Murphy*, 132 Cal. Rptr. 2d 688, 693-94 (Cal. Ct. App. 2003) (ruling against allowing CCTV for witness because even if the court might allow a testifying adult victim, who would otherwise be traumatized, to testify by CCTV, the witness in this case did not make the necessary factual findings based upon evidence).
Face-to-face confrontation can be denied only where the trial court finds (1) that there is an important public policy that will be served by denying physical confrontation, (2) that such denial is necessary to further that policy, and (3) that other measures will ensure the reliability of the testimony. The important public policy of protecting adult witnesses from further traumatization has already been explained above. However, that may not be the only important public policy to allow adult witnesses to use CCTV. Protecting the well-being of the adult witness from harm and intimidation has been ruled to be an important policy for non-sexual assault victims. Also, 18 U.S.C. § 3509 holds that a child witness may use CCTV if he or she cannot testify in front of the defendant because the defendant or defense counsel’s conduct caused the child to be unable to testify. Hence, protecting against intimidation is an important public policy and protecting adult rape victims from harm and intimidation by letting them use CCTV should be a consequential extension of that policy. Additionally, as explained above, courts have held that there is a significant public policy to expeditiously and justly resolve criminal matters if the witness cannot give testimony in front of the defendant. If a rape victim is afraid to give testimony in front of the defendant, then the case cannot be justly resolved as key testimony is missing. However, if the witness can give testimony through CCTV, then the case can be rightfully ruled. Thus, this important policy of justly resolving criminal matters should also apply to adult rape victims and allow them to use CCTV.

For necessity, this needs to be determined on a case-by-case basis. The court must hear evidence to determine whether the denial of face-to-face confrontation is necessary to further the

125 See Craig, 497 U.S. at 850.
128 See, e.g., Harrell, 251 F.3d at 931; Johnson, 2014 WL 4829592, at *17.
129 See Craig, 497 U.S. at 855-56.

public policy. If the interest is that the witness would face trauma from testifying in the presence of the defendant, then there must be evidence that emotional trauma is not de minimus and is due to testifying in the defendant’s presence and not testimony in general. This can easily be achieved by having an expert give factual findings about the adult witness to show that CCTV is in-fact necessary (for example, this can be a showing that the witness would be traumatized from testifying in front of the defendant or that the witness would be intimidated). For reliability, this is assured by providing the defendant with the right of cross-examination; having the witness give statements under oath; and granting an opportunity to assess the witness’s demeanor. This can be met by having the adult witness who is giving testimony by CCTV be sworn, be subject to a cross-examination, and be positioned on the camera so that the jury, judge, and defendant can see his or her demeanor.

Therefore, it is possible for the elements of Craig to be established by allowing an adult rape victim to use CCTV. Because of this, CCTV should be granted to adult rape victims in place of face-to-face controversy established by the Confrontation Clause if the Craig elements are met.

VI. Proposed Rule

Now there is a new rule proposed – one that will protect witnesses from trauma and intimidation, but will also advance justice by encouraging more rape victims to report the crime and go to trial. This rule states: the court may order that the testimony of an adult who is a rape victim be taken by closed-circuit television if the court finds that the adult is unable to testify in open court in the presence of the defendant, for any of the following reasons: (1) an expert has determined that there is a substantial likelihood that the adult would suffer

130 See id.; see Murphy, 132 Cal. Rptr. 2d at 693-94.
emotional trauma from testifying; (2) the adult is suffering from an infirmity which severely restricts his or her ability to travel to the court; or (3) the defendant or defense counsel’s conduct caused the adult to be unable to continue testifying due to intimidation.

This new rule, however, will not be in place without its opponents. Some may argue that it is more difficult to judge the truthfulness and reliability of a witness testifying on a television screen. However, no matter if the witness is in court or on video, it is equally hard to determine truthfulness. This is shown by the fact that social scientists have amassed substantial evidence that most people are unable to identify whether a witness is lying from the witness’s demeanor.133 Also, the Sixth Circuit noted that there is evidence that face-to-face confrontation would in fact preserve the Confrontation Clause’s truth-seeking goal, because witnesses would be afraid and not give truthful testimony.134 Another argument is that this will open up a floodgate to more and more adult rape victims using CCTV. This could potentially lead to false convictions due to jury members believing that the defendant must be guilty if the witness is too afraid to testify. However, the floodgate will not be opened, because CCTV is only going to be used when proven to be necessary. Thus, its effect on false convictions will be minimal. The next argument is that allowing the use of CCTV to adult rape victims will be a slippery slope towards allowing CCTV for adult victims of any crime. This is not the case though as it is clinically proven that rape actually leads to PTSD in the form of rape trauma syndrome.135 Other crimes simply do not have the same harmful effects to allow CCTV.

Some critics may also argue that it is unfair to the defendant to allow witnesses to testify over camera. However, many courts have already ruled that CCTV can be used, showing that allowing witnesses to testify over camera is not unfair.136 What is unfair though is allowing a rapist to use fear to keep the witness from testifying and levering his or her way to freedom.137 Finally, some people may argue that this law would be hard to administer because it is too hard to determine when the use of CCTV is necessary. This argument is not strong though, because necessity can simply be determined through hearings with experts (so judges do not have to rely solely on witnesses exclaiming they are afraid).

This rule promotes good and just ends as well. First, this rule allows for the defendant to hear allegations directly from the witness as opposed to a mere second-hand account of the witness’s testimony.138 This helps ensure that the testimony is accurate and that the accusations are real.139 Next, this rule takes advantage of our modern technology today and allows for a procedure that is efficient, convenient, and cost-effective.140 Finally, this rule will promote justice. With this rule in place, more victims will be willing to report the crime, as they will not have to fear testifying in front of their rapist. This rule will also promote justice, because now key witnesses who were once afraid to testify will give testimony and lead to more just trials.

VII. Conclusion

The Confrontation Clause of the Sixth Amendment has been interpreted in Roberts to dismiss face-to-face testimony only (1) after a showing of unavailability by the witness and (2) when the statement bears adequate indicia of reliability.141 Although Roberts has been overruled by

134 See Danner v. Motley, 448 F.3d 372, 377-79 (6th Cir. 2006).
135 Jan Welch & Fiona Mason, supra note 101, at 1157.
136 See, e.g., Craig, 497 U.S. at 836.
137 See Evans, supra note 56, at 494.
138 Perry, supra note 117, at 587.
139 Id.
140 Id. at 568.
141 See Roberts, 448 U.S. at 66.
Crawford, the courts still apply the process outlined in Roberts for CCTV testimony.\textsuperscript{142} This can be seen in Craig where the court ruled that child victims of sexual assault can use CCTV if it is necessary to further an important public policy of protecting the witness from further trauma and the testimony is reliable.\textsuperscript{143}

The use of CCTV should also be used to allow adult rape victims to testify outside the presence of the defendant. This procedure can potentially promote important policies such as preventing trauma due to testifying in front of the defendant as well as a purpose to protect witnesses against intimidation. CCTV in this situation also meets the other elements of reliability and necessity. Importantly, allowing adult rape victims to use CCTV could potentially encourage more victims to report the crime and greatly promote justice. Thus, adult rape victims should be permitted to testify by CCTV when the elements of Craig are established.

\textsuperscript{142} See Craig, 497 U.S. at 850.

\textsuperscript{143} Id.