

Confrontation of Witnesses in US Criminal Actions: Limits on Technology Enabled Interaction

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Introduction

As technology allows new and enhanced ways of interaction and communication, its application in a legal context presents complex issues for evaluating established principles of rights guaranteed to individuals accused of crimes. In the global reach of internet based interaction, crimes are often committed by and against the interests of people and organizations with domiciles or situs in different countries. At a recent conference “Cybercrime: A Global Challenge, A Global Response” held in Madrid on December 12 and 13, 2005, The Council of Europe, the Organization of American States and the Spain Ministry of Justice) recognized and noted that most cyber crime is international cyber crime.¹

The availability of witnesses to prosecute such crimes of global nature may not be guaranteed, because often those witnesses are beyond the jurisdictional ability of a national court’s subpoena power. Utilizing technology that is pervasive in personal communication, business and private legal actions, such as two way video and conferencing, would seem to provide a valuable tool for furthering the interests of national governments in prosecuting cyber crimes. Reconciling the law with those technologies is a potential problem. This paper reviews a number of legal principles that apply to the use of technology for witness testimony and considers the factors in favor and against the use of such technologies in the framework of current law in the United States.

Right to Confront Witnesses

In the United States, under the federal constitution, a person accused of a crime has the right to confront witnesses against them. The Sixth Amendment to the United States Constitution provides a variety of rights to those accused on criminal conduct, including the rights, “to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.” This right of confrontation has been noted as fundamental to, “our society’s core notion of procedural fairness.”² The rationales supporting it include, “it just seems fair”; it ensures equal participation by the defendant and it “allows both sides to develop and present their cases contemporaneously.”³ The requirement of actual physical presence also addresses the need to adequately judge the reliability of the evidence admitted during the testimony by participants having the opportunity to directly view the witness and their demeanor. The expectations of benefits to be derived from this requirement of the confrontation clause is not that it will guarantee individual justice, “Although its guarantees may incidentally result in

¹ http://www.coe.int/T/E/Legal_Affairs/About_us/Cooperation/5Madrid%28cyber%29_OAS.asp

² Raymond LaMagna , (Re)Constitutionalizing Confrontation: Reexamining Unavailability And The Value Of Live Testimony, 79 S Cal L Rev1499

³ Id.

furthering accuracy, the primary goal of the Sixth Amendment is to guarantee fair and equal criminal procedure.”⁴

The United States Constitution provision is similar to Article 6(3) (d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁵ That Convention gives the right, to someone charged with a criminal offense, to examine, or have examined, witnesses against them. When the confrontation of witnesses utilizes the technology of two-way video, a recent case in the United States holds that the accused person’s rights of confrontation have been violated.

The European Commission Department of Justice and Home Affairs recognized the potential for conflicts between prosecution of cyber crime cases and protection of individual interests. In 2002 it noted, “it may prove more difficult to protect individuals’ rights in cases of cyber-crime because of complex issues such as the determination of the competent jurisdiction, the law applicable and cross-border enforcement.”⁶ In a further representation of the complexity of criminal conduct in “cyber space” and through the use of technology, the Department also conceded that “Different views exist on what constitutes cyber-crime. In fact, the terms “cyber-crime” “computer crime”, “computer-related crime,” and “high-tech crime” are often used interchangeably. There is a clear need to address the phenomenon in its broadest sense, as any crime that in some way or other involves the use of information technology.”⁷

This uniform recognition of individual rights, the complexity of application of existing laws and rationales to evolving technology and difficulty in anticipating the dimensions of global, technology based criminal actions create an opportunity for considering the nature of the way people communicate.

Two Way Video and Confrontation

In a recent criminal case in the United States, involving crimes committed over the internet, a Circuit Court of Appeals, sitting en banc, ruled that two way video presentation of witness testimony deprived the criminal defendants of their right to confront witnesses against them. In the case of *United States v. Yates*,⁸⁹ the defendants were tried in a criminal action in a District Court in Alabama. They were found guilty of a variety of charges including mail fraud and conspiracy to commit money laundering as a result of their operation of an internet based pharmacy called the Norfolk Men’s Clinic. The district court made a finding of fact that addressed the emerging opportunities provided by telecommunication technology to allow new and enhanced methods of interaction. The appellate court in its initial decision by a three judge panel, that was later vacated in order to provide the en banc opinion, did not consider this finding of fact as it was not regarded as case specific.¹⁰

During the course of the trial the Government made a motion, approved by the judge, to allow the use of two way video conferencing to introduce the testimony of two witnesses from Australia who were outside the subpoena power of the court. The witnesses had refused to appear in court but were willing to testify using the two way video. The witnesses were sworn in by an office of the

⁴ Id.

⁵ “Article 6 – Right to a fair trial 3. Everyone charged with a criminal offence has the following minimum rights: d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”

⁶ http://ec.europa.eu/justice_home/fsj/crime/cybercrime/fsj_crime_cybercrime_en.htm

⁷ Id.

⁹ *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006)

¹⁰ The district court also noted that “in today’s world of the internet and increasing globalization, more and more situations will arise in which witnesses with material knowledge are beyond the subpoena power of the Court.” (R.3-314 at 22.) Because this finding regarding the future of telecommunications was not case-specific, we do not consider it.” *US v. Yates*, 391 F.3d 1182, (11th Cir. 2004)

court in Alabama and they then presented testimony, that according to the court, was necessary to support an “important public policy of providing the fact finder with crucial evidence.” The defendants objected to the admission of the testimony on the basis that such two way video interaction denied them their constitutional right to confront the witnesses against them.

Analysis of this and other cases provides a framework for understanding the conflict between technology enabled interaction and established principles of individual rights. As national jurisdictions try to find ways to fight crimes committed utilizing technology and the internet, conflicts between traditional concepts of individual rights and new technologies must be reconciled.

In *Yates*, the Appeals Court applied basic constitutional rules formulated in the case of *Maryland v. Craig*.¹¹ In that case, involving the testimony of a minor child against a defendant accused of child abuse, the United States Supreme Court articulated a standard for the use of one way video¹² testimony in light of confrontation rights under the Sixth Amendment. That standard reasoned that typically the right to confront witnesses involves a “face to face meeting” but that is not always an absolute requirement. *Craig* had allowed the use of one way video testimony when “considerations of public policy and necessities of the case” require. The standard also required that absent a physical face to face confrontation the “reliability of the testimony be otherwise assured.” Following the *Craig* decision it became a prominent feature in cases involving child abuse that minor witnesses, after a finding following the *Craig* criteria, would be allowed to testify via the one way video.

The *Yates* court found, in the case before it involving two way video, that while the lower court had appropriately acknowledged the first part of the Craig test (public policy) it had not considered the necessities of the case. It then reviewed the availability of depositions that would have been admissible to submit the witness testimony at trial and rejected the necessity of the two way video.¹³

The interaction between law and technology in this case of witness testimony has underlying it the changes that technology makes in the ways people communicate on a day to day basis. Should testimony be disallowed because, “Given the ubiquity of television, even children are keenly aware that a television image of a person (including a defendant in the case of a two-way system) is not the person - something is lost in the translation. Thus, a defendant watching a witness through a monitor will not have the same truth-inducing effect as an unmediated gaze across the courtroom.” In the alternative should the legal regime be more accepting of these new technological capabilities?

Why Support Two Way Video Witness Testimony?

There are numerous supportive arguments for utilizing video witness testimony in criminal cases. One of the most obvious is that fact that it should be allowed because with technology “we can” or because it allows for such interaction and communications. The pervasive nature of telecommunication technology has redefined the way that humans interact and many people are comfortable using many different communication mediums. Not only are people comfortable with evaluating information communicated via different technologies but they typically appreciate the different limitations and benefits that are inherent in each. Historically each new wave of

¹¹ *Maryland v. Craig*, 497 U.S. 836 (1990).

¹² Emphasis added.

¹³ Perhaps the Court’s motivation can be in part reflected in a footnote that says, “n11 Despite finding that the Government knew of the Australian witnesses and their relevance for over two years before it made its pre-trial motion, that the Government had seriously delayed in making its request to admit video conference testimony by the Australian witnesses, and that this serious delay “would likely typify the kind of delay warranting the denial of a Rule 15 deposition,” (R.3-314 at 27.), the district court found that the delay created “no real prejudice” to Defendants. (*Id.* at 9-10.) We disagree.”

communications technology initially creates confusion and reticence before its adoption and embrace in legal procedure.

In considering the purpose of the confrontation clause the reliability of the testimony or evidence being represented is one underlying concern. Two way video clearly provides an opportunity to see a witness, to question them and to have a contemporaneous exchange. Lesser methods of introducing testimony are allowed. For instance, the Federal Rules for Criminal Procedure¹⁴ clearly anticipate the use of depositions to gather evidence that may later be introduced at trial, the use of communication technology that allows for two way, real time interaction must be undoubtedly better. The dissent in *Yates* was particularly concerned with the majority's reliance on an ineffective medium such a deposition when a modern communication technology was readily available.

The pervasiveness of communication technology not only makes participants such as jurors, judges and attorneys comfortable with evaluating the nature of the proceedings and interactions, but the appropriate technology typically can be made available in practically any country in the world. The global dimensions of internet and cyber based crimes certainly would seem to require that the same technologies used to commit the crimes be used as a tool in fighting them. Finally, the ability to preserve a record and save and store a virtually limitless amount of information transmitted through video technology preserves a record that may be indispensable in evaluating trials on appeal. The record can be perceived as being at least as good as a written transcript or deposition.

Problems With Two Way Video Testimony

There are, of course, many attributes of video based witness testimony in criminal cases that should give reason for pause and consideration. Perhaps the most obvious problem is the lack of visual perspective that jurors may have related to a witnesses testimony. All that can be seen is what the camera captures; therefore activities outside the field of view that may account for demeanor and or behavior of the witness are unknown. Some people in fact are "friendly to the camera" and such video capture may skew the appearance of their testimony. In the *Yates* case the majority opinion noted aspects of the record that indicated such difficulties.¹⁵ The unique

¹⁴ "Rule 15. Depositions (a) When Taken.(1) In General. A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated material that is ... (b) (1) In General. A party seeking to take a deposition must give every other party reasonable written notice of the deposition's date and location. The notice must state the name and address of each deponent. If requested by a party receiving the notice, the court may, for good cause, change the deposition's date or location. ... (d) Expenses. If the deposition was requested by the government, the court may -- or if the defendant is unable to bear the deposition expenses, the court must -- order the government to pay: (1) any reasonable travel and subsistence expenses of the defendant and the defendant's attorney to attend the deposition; and (2) the costs of the deposition transcript."

¹⁵ 438 F.3d at 1310 footnote 2, "The record reflects, however, some technical difficulties that impacted the abilities of the witnesses, Defendants and counsel to see each other and to communicate during the video conference. For example, during Christian's testimony, the following exchange occurred:

Q. [by Assistant U.S. Attorney] I'm going to ask the gentleman controlling this to take a look around the courtroom here so you can see everybody that's in this room and ask you if you see Mr. Pusztai.

[Camera scanning the courtroom]

... Sir, have you seen Mr. Pusztai?

A. [by Christian] I think so. It's a little bit hard to focus on the camera. There, are we? Yes.

Konkoly's inability to see clearly was also a problem:

Q. [by Assistant U.S. Attorney] Do you know whether or not you would recognize the partner that you have referred to that was at the dinner with Mr. Pusztai?

A. [by Konkoly] I think so.

[Camera scanning the courtroom]

nature of a “face to face” trial as a basis for ascertaining the truth has been recognized in relationship to other trial situations as well. In committee notes to 1996 amendments to the Federal Rules of Civil Procedure, it was noted “the very ceremony of trial and the presence of the factfinder may exert a powerful force for truth-telling.”¹⁶

With the separation in place, if not time, the ability of an accused to “confront” the witness in such a way that allows jurors to judge emotions and demeanor while responding to questioning is limited. In other words, communication technology can mask confusion, anger, fear etc. In the case of *United States v. Gigante*, the court said “there may well be intangible elements of the ordeal of testifying in a courtroom that are reduced or even eliminated by remote testimony.”¹⁷ But proceeded to allow two way video conferencing in case involving a witness who “(1) was a former mobster participating in the Federal Witness Protection Program, (2) was at an undisclosed location, and (3) was in the final stages of inoperable, fatal cancer. In addition, the district court found that the defendant was unable to travel due to his own medical problems.” Interestingly, *Gigante* represents the only case in the United States, thus far, that has refused to apply the standard for admissibility utilized in the *Craig* decision noting that it was inapplicable as *Craig* was based on the utilization of one way video, not two way, with its greater freedom of interaction.

In the case of *United States of America v. Bordeaux*¹⁸ the court considered whether the use of *closed circuit two way video* (emphasis added) to allow a minor witness who expressed fear of the defendant, to testify, violated the sixth amendment confrontation clause. The trial court failed to apply the *Craig* analysis in making its determination of admissibility. The appellate court considered the government’s claim that such an analysis was not required because of the opportunity of interaction in two way closed circuit video. While one way video clearly presents issues about the validity of “confrontation” and so would trigger *Craig*, two way video would seem to have no limiting features because of the possibility for interaction. The appellate court however said, “two-way systems share with one-way systems a trait that by itself justifies the application of *Craig*: the “confrontations” they create are virtual, and not real in the sense that a face-to-face confrontation is real. The virtual “confrontations” offered by closed-circuit television systems fall short of the face-to-face standard because they do not provide the same truth-inducing effect.”¹⁹

Commentators on the subject, ranging from academics to Supreme Court Justices have questioned the nature of two way video as a means of meeting confrontation standards for witness testimony. Richard Marcus, Horace O. Coil, Chair in Litigation at the University of California, Hastings College of the Law notes, “There would seem to be a qualitative difference in the nature of the interaction among jurors, judge, parties, counsel, and witnesses. Unlike a courtroom, the choices about what should be displayed would still be made largely by the “director” of the proceedings.”²⁰ He continued by noting, “Justice Scalia’s view, such remote testimony would improperly substitute “virtual confrontation” for the real thing required by the Confrontation Clause in a criminal trial. Under some circumstances, moreover, there could be a danger of signaling or other inappropriate behavior that would be invisible to the jurors but affect the witness’s testimony.”²¹

... May I have a close look at the lady on the left-hand side in the back, please?

The Court: Yes, you may.

Technician: This is the closest I can zoom in.

[by Konkoly] If you could go to the side a bit, please. I cannot see from the corner of the screen. [Scanning]

No I can't not [sic] say that categorically. I cannot recognize the face at the present-time.”

¹⁶ Fed. R. Civ. P. 43(a)

¹⁷ *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999)

¹⁸ *United States of America v. Bordeaux*, 400 F.3d 548; (8th Cir. 2005)

¹⁹ *Id.*

²⁰ Richard L. Marcus, *E-Discovery & Beyond: Toward Brave New World or 1984?*, 25 *Rev Litig* 633 at 676, it was also noted that “In addition, adroit cinematography could markedly alter the impact of a witness’s testimony from what it would be it would be in the courtroom.”

²¹ *Id.*

People who have used technology in a public setting are familiar with the instance when it does not work properly or perhaps the technology is not available. In the *Yates* case the two way video testimony was actually taken in the United States Attorney's office when the trial was moved because the court room was not outfitted with the appropriate equipment. Such failures can lead to interminable delays and in some cases cancellations. In the case of a criminal trial, while some delays may be common, if it is caused by the technology, then it maybe prove to have some prejudicial impact. There are of course other logistics to consider as well. The court in *Bordeaux* said, "Even if we assumed that a two-way system might conceivably capture the essence of the face-to-face confrontation in some situations, whether it actually did would turn on the answers to a myriad of hard logistical questions (How big must the monitor be? Where should it be placed? Where should the camera focused on the defendant be placed?) that would render the theoretical promise of the two-way system practically unattainable."²²

There are additional issues of trial procedure that reflect the disconnect between the ability to utilize technology in the courtroom and processes followed to ascertain the truth. In the vacated decision in *Yates*, a concurring opinion questioned the validity of an oath administered via two way video by an official of the United States government to a person who was a citizen of another country and present in that country. He noted "The correct inquiry, first, is whether the court clerk in Alabama is a competent officer to give a valid, meaningful oath when the oath-taker is a foreign national reciting the oath in a foreign country. To awaken a witness's conscience and to impress upon him his duty, the oath must be valid and meaningful. Very little is impressed upon a witness sitting in a foreign country looking at an American trial on a video screen when the screen and witness are in a room thousands of miles away from the trial and on a different continent: far away from the defendants, judge, jury, clerk, and counsel."²³ The purpose of the oath before testifying is to make the witness aware of their responsibility and to impress upon them the need to tell the truth. The distance, location, jurisdiction and separation via technology may limit the effectiveness of the oath to accomplish that end.

Security issues provide a scenario of possible problems with two way video testimony of witnesses in criminal actions, particularly of the type in *Yates*. In the case of *Bordeaux* the system used as a two way closed circuit video and was not able to sidestep the *Craig* analysis. In *Yates*, the system used involved global telecommunications systems that do not have the security of a closed circuit system. With the opportunity for access comes possible manipulation making the need for guaranteeing the security of the proceedings a first and foremost consideration. Even in *Yates* the decision in the vacated judgment noted a concern about the trial being moved to the prosecuting attorney's office.²⁴ A concern premised likely on the possible prejudicial nature of the surroundings, but highlighting a need to address the issue as to how to guarantee the security of the system. In cyber crime cases the ability of cyber criminals to distort, block, record etc. testimony via communication technology is a potential threat.

Conclusion

There are a variety of criticisms that can be leveled against the use of video technology as away to introduce witness testimony in criminal trials. "Virtual is not real;" physical presence induces truth; manipulation of the technology and/or process; logistics of equipment; direction; and control

²² 400 F.3d at 555

²³ *US v. Yates*, 391 F.3d at 1190, He continued, "Courts must take the idea of witnesses testifying under oath seriously. It is hard to feel the significance of an oath, when a person in one sovereign country is just looking at a television screen at an image of a court clerk representing a foreign government a very long airplane ride away and in an altogether different sovereign country."

²⁴ "The Defendants also objected to conducting the video teleconference in the United States Attorney's office. While the Defendants have abandoned this objection on appeal, we remain concerned with the shift of a trial to a United States Attorney's office." 438 F.3d at 1187

are all legitimate claims. However, such claims do not recognize the expansion of communication technology into virtually every facet of modern life. The fact that most people are comfortable and familiar with the use of such technology, its limitations and benefits may make a rule that places such testimony on an equal footing with evidence introduced by deposition inevitable. Such a rule, to amend the Federal Rules of Criminal Procedure, was proposed in recent years only to be turned down by the Supreme Court. As a result of *Yates* it is clear that in the United States, when a deposition can be utilized, a request for two way video testimony will not be approved because it will not meet the *Craig* test of necessity. Perhaps there will be a reevaluation of the confrontation clause as it applies to two way video witness testimony as new technologies and securities emerge.