CASE NO. 2023-0156

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE THIRD DISTRICT COURT OF APPEALS
LOGAN COUNTY, OHIO

STATE OF OHIO
Plaintiff-Appellee

v.

ELI Y. CARTER
Defendant-Appellant

OHIO PROSECUTING ATTORNEYS ASSOCIATION AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEE

Counsel for Amicus Curiae

MICHAEL C. O'MALLEY (0059592)
Cuyahoga County Prosecuting Attorney

DANIEL T. VAN (0084614)
KRISTEN HATCHER (0093864)
Assistant Prosecuting Attorneys
The Justice Center
1200 Ontario Street
Cleveland, OH 44113
(216) 443-7800
dvan@prosecutor.cuyahogacounty.us

Counsel for Appellee

ERIC STEWART
Logan County Prosecutor
117 East Columbus Avenue
Bellefontaine, Ohio 43311
(937) 599-7272
eric@co.logan.oh.us

Counsel for Appellant

SAMUEL H. SHAMANSKY (0030772)
DONALD L. REGENSBURGER (0086958)
523 South Third Street
Columbus, Ohio 43215
(614) 242-3939
shamanskyco@gmail.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

US CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

STATEMENT OF AMICUS INTEREST

The Ohio Prosecuting Attorneys Association (OPAA) is a private, nonprofit trade organization that supports the state's 88 elected county prosecutors. Each county prosecutor is charged under R.C. 309.08(A) with inquiring into the commission of the crime and prosecuting on behalf of the state, all complaints, suits, and controversies in which the state is a party. The founding attorneys developed the original mission statement, which is still adhered to. It reads: "to increase the efficiency of its members in the pursuit of their interest; to broaden their interest in government; to provide cooperation and concerted actions on the polices which affect the office of the Prosecuting Attorney, and to aid in the furtherance of justice. Further, the association promotes the study of law, the diffusion of knowledge, and the continuing education of its members." Its mission includes assisting county prosecutors to pursue truth and justice as well as to promote public safety and to ensure justice for crime victims. And it is in furtherance of justice to guarantee that the laws of the State of Ohio are faithfully executed, and that the public's safety is ensured.

In this case, Appellant's proposition of law implicates the application of the Confrontation Clause to the use of remote testimony in a criminal trial. Confrontation Clause questions potentially touch upon all felony prosecutions in Ohio, ranging from lower-level felonies to sexual assaults and homicides. Remote testimony is not new. Its use pre-dates the COVID-19 pandemic. Courts have affirmed the use of remote testimony under United States Supreme Court precedent. The OPAA supports the position of the State of Ohio through its interest in ensuring the availability of remote testimony under circumstances that do not violate a defendant's rights under the Confrontation Clause. This case represents such a circumstance. And so the OPAA urges that the judgment of the Third District Court of Appeals be affirmed.

STATEMENT OF THE CASE AND FACTS

Eli Carter ("Appellant") was convicted of two counts of sexual battery in violation of R.C. 2907.03. The charges stem from his illegal sexual conduct with his foster daughter, later his adoptive daughter.

N.C., as a 20-year-old adult, reported to the Bellefontaine Police Department that she had been sexually molested by Appellant, her adoptive father, over several years. The sexual misconduct spanned Logan and Champaign counties. At trial, N.C. testified that she grew up in the foster system, ultimately being placed at Adriel School at the age of 14. (Tr. 28, 29). Appellant and his wife Liz Carter were "teaching parents" at Adriel. (Tr. 31). The Carters fostered N.C. in their home at Bellefontaine. (Tr. 32). At the time, N.C. was excited because she had a good relationship with the Carters. (Tr. 32). But life with the Carters turned out to be less than ideal. Eventually, the Carters adopted N.C. when she was 17. (Tr. 28, 36). During her time with the Carters, N.C. noticed weird behaviors like Appellant standing outside a bathroom window while she was in the bathroom, Appellant grabbing N.C.'s thigh or ripping off her bra. (Tr. 39-40). She recalled Appellant rubbing her vagina. (Tr. 40). A few days later Appellant "had sex" with her. (Tr. 41). Appellant would make her give oral sex and would have her play with his genitals. (Tr. 41). Appellant would suck on her breasts. (Tr. 41). She remembered sex acts in the "man cave." (Tr. 41). N.C. did not stop Appellant. As she explained:

> The majority of the time I just felt that it was something that I was going to have to endure for as long as I was there because once it started I didn't, it just didn't feel like it was ever going to stop and it felt like in order for me to, I felt like I was living the, like it haunted me, dreaded it, like I really, really did.
>
> I dreaded it. I wanted it to stop but I didn't think that it would. So it became something that I felt like I had to let him do that I had to engage in [sic] order to sustain me being a part of that family. Like I was 17. Who, nobody's going to want me if I go back into the system. So yeah.

(Tr. 43).

Clearly N.C.'s upbringing in the foster system made her vulnerable to Appellant's sexual misconduct. Appellant told N.C. that if she told anyone, N.C. would not have a family anymore. And she believed him. (Tr. 44.).

The sexual abuse continued after N.C. turned 18. (Tr. 49). The acts would occur when she would come "home" for the weekends from college and they would happen when she was at college. (Tr. 46, 49). N.C. would go to the police. She reported the sexual abuse to the Bellefontaine Police Department and gave a statement in 2010. (Tr. 58). Seven years later, N.C. contacted the prosecutor's office. (Tr. 59). The case was prosecuted.

N.C. testified in person and in open court. (Tr. 27-96). She endured cross-examination. (Tr. 63-95). Other witnesses corroborated N.C.'s testimony. Scott Marlow, Miranda Borland, and Dwight Salyer testified and brought context to the investigation. (Tr. 97-152). Another witness testified as to a tacit admission of guilt. Kurt Penhorwood knew Appellant through employment and coaching basketball together. (Tr. 154). Without objection, Penhorwood agreed that he talked to Appellant regarding the allegations of sexual abuse. Although Appellant "basically denied" the allegations, Penhorwood came forward over a particular concerning conversation. (Tr. 157). Liz asked Appellant if he was going to tell Penhorwood about "the one thing that did happen," and when confronted he denied what he was being accused of but his only question was, "if it was consensual, why am I getting charged with rape?" (Tr. 158). Even if Appellant asked this in the form of a rhetorical question it was a tacit and unwitting admission of guilt to a sexual offense.

Before trial, the State filed a motion requesting that witness Michael Mullins be allowed to testify via video for the jury trial scheduled during the week of February 9th and February 11th, 2022. *State's Motion for Witnesses to Testify via Video* at 1. The State cited the increase in the spread of COVID-19 and uncertain weather conditions. *Id.* In response, Appellant referenced

COVID-19 rates in Ohio and Minnesota an argued against allowing witnesses to testify remotely. *Memorandum Contra State's Motion for Witnesses to Testify via Video* at 3.

The trial court made case-specific findings, referencing the COVID-19 pandemic, and potential weather and travel issues. As a result, the trial court found Mullins unavailable to testify and that the video conferencing system could provide the opportunity to confront and cross-examine the witness. The court noted its video conferencing system was funded through a grant from this Court. *Judgment Entry Granting State's Motion for Michael Mullsins (sic) to Appear via Live Video* at 2, 3.

The video conferencing system worked. (Tr. 202). Prior to beginning his testimony, Mullins volunteered that he wore a cochlear implant and a hearing aid and that he used captioning as an aid. (Tr. 202.). The rial court instructed Mr. Mullins to rely on the verbal communications that occurred. (Tr. 204). The witness agreed to do so. (Tr. 204). It was apparent that the witness could be seen and heard. (Tr. 202). The witness testified about his prior employment at Adriel. (Tr. 209). Relevant to this case Mullins explained the allegations that Appellant engaged in sexual conduct with N.C.:

> I was approached – I was asked to be seen by David and Becky Palmer, who were the – the brother and sister-in-law of Eli, and they – they asked to come to my office, in which they did. And they both expressed that they had to share with me something that was very uncomfortable but they felt that they had a professional obligation because they too were employees of Adriel, and they shared that information with me.
>
> [***]
>
> After that, I made a request for Mr. Carter to come to my office to have a conversation and to understand from him what had happened.
>
> [***]
>
> Well, it was surprisingly a very short meeting. There was very little dialogue on my part. And to the best of my recollection, Mr. Carter simply walked into the office, made a statement that it was true, that he did engage in a sexual relationship with [N.C.] but it was

> consensual and it was after the age of 18, and he said I resign, and he walked out of my office. It was that short.

(Tr. 213, 214).

Appellant testified on his own behalf. He claimed that the allegations where about money, a sum of $7,000.00. (Tr. 259). Appellant believed that N.C. stopping medication and past abuse caused her to make up the allegations. (Tr. 260). When asked about Mullins testimony, Appellant replied that Mullins "misremembered our conversation." (Tr. 261). Appellant denied having any private conversation with Kurt Penhorwood about N.C.'s allegations. (Tr. 263, 264). However, Appellant admitted to asking Penhorwood the question about the issue of consent. (Tr. 265).

The jury's verdict finding Appellant guilty of two counts of sexual battery (counts four and six) reflected that the State proved beyond a reasonable doubt that sexual conduct occurred between Appellant and N.C. after she had turned 18. (Tr. 28, 310-311, 330-331).

On appeal, Appellant raised a single assignment arguing that the trial court erred in permitting Mr. Mullins to testify by remote means. The Third District rejected Carter's claim that the remote testimony of the witness violated his Confrontation Clause rights. The Third District explained:

> Prior to trial, the State requested the trial court to permit Mullins to testify remotely because he resided in Minnesota. Due to *spikes* in the number of reported Covid cases and the potential for bad weather (in Minnesota and Ohio) at the time of trial, the State argued for the witness to testify remotely. In rendering its decision on the State's motion, the trial court noted that live-video testimony was more commonplace than it was prior to the pandemic. The trial court further noted that, in addition to the Covid pandemic, airline-labor shortages (resulting from the pandemic) and other causes were creating unprecedented travel delays resulting in mass cancellations of airline flights.
>
> Here, even if we were to assume without deciding that the possibility of inclement weather was insufficient to warrant an exception for Mullins's video-conferenced testimony, we nevertheless conclude that the trial court's determinations were justified on a case-specific finding based upon an important public policy involving the Covid pandemic. Indeed, Carter's memorandum contra to the State's motion detailed Kentucky's, Minnesota's, and Ohio's Covid-case data for a seven-day

> average. That data reflected that Minnesota's seven-day average was *more than* three times the Ohio Covid-case average Thus, it is evident to us that the trial court considered the needs of the public and the trial court including all staff, the attorneys, and most importantly, members of petit jury, from exposure to Covid.
>
> In addition to the foregoing, we recognize this is not an issue of witness convenience, but rather, the trial court's duty to protect those who come and go from the courthouse and to maintain the orderly administration of trial proceedings.
>
> Since we reached the conclusion that the combination of the pandemic and resultant airline-labor shortages were sufficient bases to justify the trial court's determination, we leave the question of whether the possibility of inclement weather is independently sufficient to warrant an exception to a criminal defendant's right to confrontation for another day.
>
> Accordingly, we conclude that under the specific facts and circumstances of this case, the use of two-way-live-video-conferencing allowing Mullins to testify from out-of-state, did not violate Carter's right to confrontation. Here, Mullins's two-way-live-video-conference call preserved the reliability elements of confrontation given that he testified under oath; he was subject to cross-examination; and, the jury and Carter could observe his demeanor while testifying. We find no error in admitting this testimony. Hence, there is no merit to the first portion of Carter's argument.

State v. Carter, 3d Dist. Logan No. 8-22-12, 2022-Ohio-4559, ¶ 15-19 (internal citations omitted).

LAW AND ARGUMENT

> **Proposition of Law (As Argued by Appellant): A criminal defendant's rights to confrontation, due process, and a fair trial are violated when a witness is permitted by remote means utilizing a speech-to-text captioning program in the absence of any important state interest, public policy, or case necessity.**

For three reasons, the Court should affirm the judgment below and hold that the Confrontation Clause was not violated here. First, use of remote testimony due to the uncertainty of the existing COVID-19 pandemic conditions at the time among other things served a state interest, public policy, or case-specific reason justifying the use of remote testimony. Second, the use of remote testimony did not prevent the jury from observing the demeanor of the witness testimony under oath and was otherwise reliable nor was cross-examination precluded. Third, it

cannot be shown that any use of speech-to-text captioning program was prejudicial or otherwise made the testimony unreliable.

Here the findings by the trial court recognized what was known to the world. There had been a recent surge in the COVID-19 pandemic that brought reported cases in the country to an all-time high. This, among other things, made interstate travel uncertain. Allowing remote testimony justified given the moment in time. Carter fails to show that the remote testimony was unreliable. And in any event the testimony of Mr. Mullins was cumulative to testimony already given by another witness. Appellant fails to show he was unduly prejudiced in the context of the entire trial.

I. The Confrontation Clause does not mandate face-to-face confrontation under all circumstances.

The Sixth Amendment's Confrontation Clause, as incorporated against the States, gives a defendant "the right […] to be confronted with witnesses against him." U.S. Const. amend. VI. In *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2003) the United States Supreme Court held that the Confrontation Clause of the Sixth Amendment "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." The Confrontation Clause, described as a procedural rather than a substantive guarantee, affords defendants the right to confront witnesses in person, face-to-face, to enable them to challenge the witness's credibility, perception, and recollection. That said, the Confrontation Clause does not expressly prohibit the use of alternative methods that maintain the essence of confrontation nor does it require face-to-face confrontation in all circumstances. It cannot be overlooked that today's remote video technology comes with high definition quality and is powered through gigabit internet speeds.

II. **The use of reliable remote testimony does not conflict with the Confrontation Clause.**

The use of remote testimony, specifically videoconferencing, has become increasingly prevalent in modern criminal trials, driven mostly by advancements in technology. The Confrontation Clause, as a procedural matter, should be interpreted in a manner that embraces societal and technological advancements, without compromising its fundamental principle. Remote testimony, when reliably employed, can still serve the core purpose of the Confrontation Clause. It permits observation of the witness, the ability to ask questions and hear the answers, and subject the witness to cross-examination, even if from a remote location. It is essential to emphasize that the central concern of the Confrontation Clause is to ensure the defendant's ability to challenge the witness, not the physical proximity between the parties.

The United States Supreme Court has already recognized the validity of alternative means of testimony that maintains the defendant's ability to confront witness. For instance, in the seminal case of *Maryland v. Craig,* 497 U.S. 836, 110 S.Ct. 3157, 111 L. Ed. 2d 666 (1990) , the United States Supreme Court upheld a procedure of allowing a child abuse victim to testify from a separate room via one-way closed-circuit television. The Court held that the procedure, when properly implemented, did not violate the defendant's Confrontation Clause rights. While this case pertained to a child witness, the underlying principle remains consistent – the focus is on ensuring the defendant's capacity to challenge or confront the witness, irrespective of the mode of testimony so long as there was a necessity to further an important public policy and where the reliability of the testimony is otherwise assured.

III. State Supreme Courts across the country have consistently found that preventing the spread of COVID-19 is an important policy interest under the *Craig* test.

Several state supreme courts have considered remote testimony, especially in light of the recent COVID-19 pandemic. While the United States Supreme Court has not specifically addressed live, two-way remote testimony, courts that have considered the issue consistently apply the test set forth in *Craig*. *Craig* addressed testimony obtained outside the presence of the defendant through a one-way closed-circuit television system in which the defendant could see the witness, but the witness could not see the defendant. As the Supreme Court of Minnesota noted, "nearly every jurisdiction that has addressed a defendant's Confrontation Clause challenge to the use of two-way testimony using video conferencing—both before and during the COVID-19 pandemic—has applied the *Craig* test. *State v. Tate*, 985 N.W.2d 291, 299 (Minn.2023).

Much like the case here, the Minnesota supreme court dealt with a single witness testifying remotely. *Id*. at 303. The court reasoned that "[g]iven th[e] extraordinary context of courts trying to administer justice safely during a virulent and deadly outbreak of disease, the district court correctly found that a valid public policy interest was furthered by the use of remote testimony for this one witness." *Id*. at 302. The trial in *Tate* took place during the second wave of the pandemic, in November 2020. Like Ohio, Minnesota's Governor had declared a state of emergency at the onset of the pandemic in March 2020. *Id*. at 301. At the time of Tate's trial "[t]he Minnesota court system was in flux" and jury trials in some instances were suspended. *Id*. Because of the conditions at the time, the *Tate* court "decline[d] to hold that the granting of a continuance—a matter typically entrusted to the discretion of the district court—is required before a district court may order the use of live, two-way testimony in a criminal trial." *Id*. at 303.

The uncertainty surrounding the pandemic, especially during surges such as the one in early 2022, undercut Appellant's suggestion that a "continuance is the appropriate remedy" if the

necessity is temporary. A trial court may favor a continuance in an instance where there is a definite end to the issue causing the witness's unavailability. *See, e.g., United States v. Carter*, 907 F.3d 1199, 1208 (9th Cir.2018) (reversing decision to permit remote testimony where witness was seven months pregnant). This was not the case with COVID. Although, as Appellant insists, the COVID cases in Ohio and Minnesota were declining, the trial court could not determine whether this trend would continue. "In short, unlike other cases when a district court could predict an end date…the court here did not know when the unpredictable COVID-19 crisis would ameliorate or end." *Tate* at 303. The same could be said here, where the country was coming off an all-time peak in COVID-19 cases.

The Supreme Court of Nevada, also applying *Craig*, held that trial courts must "make specific findings as to why permitting a witness to testify remotely is necessary" to further compelling public policy interests. *Newson v. State*, 526 P.3d 717, 719, (Nev.2023). The Nebraska Supreme Court agreed with this concept, finding that "preventing the spread of COVID-19 [is] an important public policy." *State v. Comacho*, 309 Neb. 494, 515, 960 N.W.2d 739 (2021). Quoting the Massachusetts Supreme Judicial Court, the *Comacho* court noted

> Protecting the public health during this pandemic constitutes an important public policy that may be the basis of a finding of necessity. COVID-19 is a highly contagious disease that spreads from person to person. An in-person hearing, with physical, face-to-face confrontation, must take place in a confined space. Such a hearing increases the risk of transmitting the virus.

Id. quoting *Vazquez Diaz v. Commonwealth*, 487 Mass. 336, 350, 167 N.E.3d 822, 838 (2021). Indeed, the United States Supreme Court has expressed a similar sentiment in a different context: "[s]temming the spread of COVID-19 is unquestionably a compelling interest." *Roman Cath. Diocese v. Cuomo*, ___U.S.___, 141 S.Ct. 63, 67, 208 L.Ed.2d 206 (2020)

In *Newson*, the Supreme Court of Nevada explained that while efforts to curtail the spread of the COVID-19 virus and protect the public health are compelling public policy interests, "to satisfy procedural safeguards, a district court must make specific findings as to why permitting a witness to testify remotely is necessary to further this interest." *Id*. For example, the case-specific finding can be witness specific, if a witness as a particular susceptibility to COVID-19, or "the case-specific finding could relate to the state of the pandemic in the trial court's locality at the time of the defendant's trial." *Id*. at 721. *See also United States v. Donziger*, S.D.N.Y. No. 19-CR-561 (LAP), 2020 U.S. Dist. LEXIS 148029 (Aug. 17, 2020) ("At least in some instances, allowing remote testimony may be needed to promote the strong public interest in avoiding exposing at-risk individuals to COVID-19 and minimizing further spread of the virus.")

In general, supreme courts across the country who have considered remote testimony apply the *Craig* test, requiring that trial courts find a case-specific necessity before granting a motion allowing remote testimony. *See e.g. C.A.R.A. v. Jackson Cty. Juvenile Office*, 637 S.W.3d 50 (Mo.2022); *State v. Richards*, 411 Mont. 391, 2023 MT 31N, 525 P.3d 24; *Haggard v. State*, 612 S.W.3d 318 (Tex.Crim.App.2020); *State v. Thomas*, 2016-NMSC-024, 376 P.3d 184; *Vazquez Diaz v. Commonwealth*, 487 Mass. 336, 350, 167 N.E.3d 822, 838 (2021); *State v. Clapp*, 170 Idaho 314, 510 P.3d 667 (2022); *State v. Martell*, 406 Mont. 488, 2021 MT 318, 500 P.3d 1233; *People v. Wrotten*, 14 N.Y.3d 33, 2009 NY Slip Op 9267, 896 N.Y.S.2d 711, 923 N.E.2d 1099; *People v. Santiago Cruz ex rel. FLR*, 205 P.R.Dec. 7, 2020 TSPR 99; *Bush v. State*, 2008 WY 108, 193 P.3d 203. Even when the outcome is that the trial court is reversed, the reason for the reversal is typically that no finding was made. For example, in reversing the trial court's order permitting remote testimony, the Supreme Court of Kentucky explained that although one of the remote witnesses was sick with COVID at the time of trial, "the trial court made no such finding, and this

was not mentioned during either discussion of remote testimony." *Spalding v. Commonwealth*, No. 2021-SC-0503-MR, 2023 Ky. LEXIS 156, 10 (June 15, 2023). Had the trial court made such a finding, "a witness sick with COVID could arguably be a compelling need justifying remote testimony under the *Craig* standard." *See also C.A.R.A. v. Jackson Cty. Juvenile Office*, 637 S.W.3d 50 (Mo.2022). (Reversing where the trial court failed to make findings, such as an enhanced risk from COVID, that it was necessary for every single witness to testify remotely).

While the focus of *Spalding* was on a witness who was ill with COVID, other appellate courts have taken the approach embraced by Nevada and Minnesota. Intermediate appellate courts have routinely found that for out-of-state witnesses, "a significant risk of contracting a virus that had killed hundreds of thousands of people was sufficient to establish necessity." *State v. Milko*, 21 Wash.App.2d 279, 293, 505 P.3d 1251 (2022). Considering a trial held in late 2021, amid the same surge that affected Appellant's trial, a California appellate court concluded that "the pandemic was not a thing of the past nor had the court returned to business-as-usual" *People v. Coulthard*, 90 Cal. App. 5th 743, 774, 307 Cal.Rptr.3d 383 (2023) quoting *Hernandez-Valenzuela v. Superior Court*, 75 Cal. App. 5th 1108, 1129, 291 Cal.Rptr.3d 154 (2022). At the time of Coulthard's trial, "[t]he COVID-19 health emergency continued to persist and governmental entities continued to be subject to health orders to limit transmission risk of COVID-19 and contain COVID-19 outbreaks." *Id*. quoting *Hernandez-Valenzuela* at 1129. *See also People v. Kocontes*, 86 Cal. App. 5th 787, 808, 302 Cal.Rptr.3d 664 (2022) ("Ensuring the health of all courtroom users during the COVID-19 pandemic was an important public policy concern").

While many trials underlying these decisions took place in 2020, before the advent of vaccination against COVID-19, this Court should not overlook the conditions that Ohio faced in early 2022. For example, in Cuyahoga County, jury trials were suspended in response to the 2021

surge in COVID-19 cases. *In re. updated order regarding continuity of operations, including jury trials, due to COVID-19 pandemic*, Cuyahoga County Court of Common Pleas Journal Entry filed 01/27/2022, https://cp.cuyahogacounty.us/media/3019/administrative-order-1-27-22-filed.pdf (accessed July 27th, 2023). They did not resume until February 7, 2022, two days before Appellant's trial in Logan County. *Id.* When trials resumed, the Cuyahoga County Court of Common Pleas was restricting jury trials, only allowing a few trials to go forward based on criteria set forth by the Administrative and Presiding Judge. *Id*. During the relevant timeframe, Summit County jury trials required the authorization of its Administrative Judge for trials to go forward, and included in the analysis of whether the trial would be permitted was whether it was necessary for out-of-state witnesses to be present. *Updated Emergency Order in Response to the COVID-19 Public Health Crisis, Summit County Court of Common Pleas, Misc. Order* filed January 21, 2022, https://www.summitcpcourt.net/wp-content/uploads/2022/01/January-21-2022-Covid-19-Administrative-Order.pdf (accessed July 27th, 2023). It was amid this level of concern for the surge in COVID-19 cases that the trial court in Logan County agreed to allow an out-of-state witness to testify remotely. Much like California, in Ohio, "the pandemic was not a thing of the past" nor had courts "returned to business-as-usual." *Coulthardt* at 774.

As the Third District pointed out, Appellant's own opposition to the state's motion for remote testimony included data that suggested that "Minnesota's seven-day average was more than three times the Ohio COVID-case average." *Carter* at ¶ 16. Although Appellant disputes the significance of the numbers, both states were experiencing a heightened COVID-19 transmission rates. Based on that information, "the trial court considered the needs of the public and the trial court, including all staff, the attorneys, and most importantly, members of petit jury, from exposure to COVID." *Id.* citing *State v. Banks*, 1st Dist. Hamilton Nos. C-200395, C-200396, 2021-Ohio-

4330, ¶ 24. Appellant may disagree with the Third District's interpretation of the data that he provided, but he takes a narrow view of the circumstances in Ohio in early 2022. The state echoed these concerns in its motion for remote testimony. Remote testimony was necessary "[b]ecause of the increase in COVID spread."

IV. Even before the COVID-19 pandemic, courts have found remote testimony admissible under various circumstances.

The COVID-19 pandemic is not the only circumstance in which courts have permitted remote testimony. Long before the pandemic, the Supreme Court of Montana examined remote testimony in the context of an out-of-state expert witness in an animal cruelty trial. *City of Missoula v. Duane*, 380 Mont. 290, 2015 MT 232, 355 P.3d 729, ¶ 5-6. While the court explained that "[t]he preferred method of introducing the testimony of a witness at trial is by way of the personal presence of the witness in the courtroom[,]" it concluded that:

> where a moving party makes an adequate showing on the record that the personal presence of the witness in the courtroom is impossible or impracticable to secure due to considerations of distance or expense, a court may permit the testimony of the witness to be introduced by Skype or a substantially similar live two-way video/audio conferencing program that satisfies the hallmarks of confrontation as herein set forth.

Id. at ¶ 25.

The Supreme Court of Iowa also considered remote testimony before the COVID-19 pandemic, holding that "two-way video conference testimony should not be substituted for in-person confrontation absent a showing of necessity to further an important public interest." *State v. Rogerson*, 855 N.W.2d 495, 496 (Iowa 2014). While the Iowa case was reversed on the confrontation issue, the state never presented a specific reason for the remote testimony. *Id*. at 497. Rather, the state argued that because the witnesses lived out of state, remote testimony "would greatly expedite and facilitate their participation in the trial." *Id*. *See also United States*

v. Yates, 438 F.3d 1307, 1310 (11th Cir.2006) (finding a justification that an "important public policy of providing the fact finder with crucial evidence" and a government interest in "expeditiously and justly resolving the case" were insufficient to allow remote testimony under the *Craig* standard.) That said, the Supreme Court of Iowa determined that *Craig* was the appropriate standard to apply. Contrary to Appellant's assertion that permissible remote testimony involves indefinite inability to travel or grave illness, the *Rogerson* court noted that the North Carolina Court of Appeals "approved remote testimony of a witness that suffered such a severe panic attack before the trial that he was consequently unable to travel." *Rogerson* at 506 citing *State v. Seelig*, 226 N.C.App. 147,158, 738 S.E.2d 427 (2013).

Similarly, the Supreme Court of Florida permitted remote testimony whenever the party bringing the motion can "verify…that a prospective witness resides beyond the territorial jurisdiction of the court or may be unable to attend or be prevented from attending a trial or hearing and 2) establish that the witness's testimony is material and necessary to prevent a failure of justice." *Harrell v. State*, 709 So.2d 1364, 1371 (Fla.1998). While one of the witnesses at issue in *Harrell* was ill, illness, grave or otherwise, does not form any part of the Florida Supreme Court's test for the use of remote testimony. The *Harrell* court also considered that "there is an important state interest resolving criminal matters in a manner that is both expeditious and just" and to accomplish that goal, "the testimony of these two witnesses was a necessity." *Id*. at 1370.

V. Ohio courts have already approved the use of remote testimony in appropriate circumstances.

In Ohio the use of remote testimony pre-dates the COVID-19 pandemic. In *State v. Self*, 56 Ohio St.3d 73, 564 N.E.2d 446 (1990), this Court held that the use of a child sexual abuse victim's videotaped deposition did not violate the Federal or Ohio Confrontation Clauses. This Court, consistent with precedent recognized that face-to-face confrontation was not absolutely

required under the Confrontation Clause and that in some cases this physical confrontation may be denied where the denial furthers an important public policy and where the reliability of the testimony is otherwise assured.

After the Court decided *Self,* the Eighth District Court of Appeals has routinely upheld the use of two-way videoconferencing for trial testimony if a victim or witness is unavailable to appear at trial. The precedent traces as far back as *State v. Marcinick*, 8th Dist. Cuyahoga No. 89736, 2008-Ohio-3553. In *Marcinick* a clinical social worker testified about a sexual assault disclosed to her by a five-year-old victim. This witness testified live via video conferencing while stationed at NATO Headquarters in Belgium. The *Marcinick* court came to its decision after carefully examining the Confrontation Clause, the *Craig* decision, and this Court's decision in *State v. Self*, 56 Ohio St.3d 73, 564 N.E.2d 446 (1990). The court explained that the witness who was in Belgium was unavailable, the two-way link preserved the reliability elements of confrontation in that the witness testified under oath, was subject to cross-examination, and the witness's demeanor could be observed. *Marcinick,* ¶22.

In *State v. Frierson*, 8th Dist. Cuyahoga No. 106841, 2019-Ohio-317, a rape victim who was deported from the United States was allowed to testify via live video link. The Defendant argued that using a Skype call to "present witness testimony violated his right to confrontation and his right to due process in his first jury trial." *Id* at ¶ 15. In this case Defendant specifically argued that the witness' unavailability was not established, but the court disagreed as proof was shown that the victim was deported and efforts to get her back to testify were unsuccessful. *Id* at ¶ 24.

In *State v. Eads*, 8th Dist. Cuyahoga No. 87636, 2007-Ohio-539, the Court held that video testimony of a grandmother in a hospital room did not violate the Confrontation Clause in a child rape case. At paragraphs 34-35 the Court wrote:

> In the instant case, the record reveals that Lillian McCray, the grandmother of TM, TB, and CM, was hospitalized at University Hospital in Cleveland at the time of the trial. McCray, a diabetic, had recently had all the toes on her left foot and one toe on her right foot amputated. The trial court allowed McCray to testify by means of a live video conference via satellite from her hospital room to the courtroom. The television screen measured ten feet wide by ten feet high, which provided ample opportunity for the jury to observe McCray's demeanor. McCray was administered an oath in front of the judge, jury, attorneys and Eads. After McCray testified, Eads trial counsel cross examined her.
>
> We conclude based on record before us that the use of the above video conference procedure to procure McCray's testimony did not violate the Confrontation Clause, nor did it prejudice Eads. Accordingly, we overrule the fourth assigned error.

In *State v. Sheline*, 8th Dist. Cuyahoga No. 106649, 2019-Ohio-528, defense counsel objected to a witness in a murder trial testifying via live video link from California claiming there was not a showing she was unavailable. On appeal that defendant further argued the witness was not unavailable to testify in person, the video-link system was faulty, that the witness couldn't see the entire courtroom when she testified, and her testimony was irrelevant.

The State argued that the testimony should be allowed because she was unavailable to testify in person as she was caring for children and unable to fly back, and the Eighth District agreed there was no violation of the Confrontation Clause. The Court determined the witness was unavailable as arrangements could not be made for her to come back and testify in person. The Court also noted that her testimony was admissible and relevant, and that the video link satisfied the elements of confrontation in that the witness was under oath, she was subjected to cross examination, and the jury and appellant were able to observe the witness's demeanor. *Sheline*, at ¶116 - 121.

Testimony via video conferencing has been used in other jurisdictions within Ohio as well. In *State v. Oester*, 5th Dist. Stark No. 2012CA00118, 2013-Ohio-2676, ¶ 38, 137 Ohio St.3d 1413, the parties used Skype in taking deposition testimony from a witness who was then serving in the

armed forces in Afghanistan. In *State v. Bowers*, 1st Dist. Hamilton No. C-150024, 2016-Ohio-904, ¶ 8, a nine-year old rape victim was allowed to give her testimony at trial via Skype. In *State v. Johnson*, 195 Ohio App.3d 59, 2011-Ohio-3143, three witnesses were allowed to testify by two-way closed-circuit television upon a showing that the defendants friends and family had tried to intimidate the witnesses not to testify in a murder trial. In *State v. Howard*, 2nd App. No. 28314, 2020-Ohio-3819, ¶ 56, the court allowed testimony of a victim who had multiple medical conditions that prevented him from traveling to court. The record showed the victim was sworn in, he was subject to live cross-examination, and the trial judge, jury, defense counsel, and defendant could observe his demeanor while he testified. *Id.* at ¶ 60.

In the COVID-19 era, courts have allowed the use of remote testimony. In *State v. Banks*, 1st Dist. Hamilton Nos. C-200395, C-200396, 2021-Ohio-4330 the use of remote testimony was allowed not because the particular witness expressed concerns or was in a high-risk exposure group, but because of a need to limit in-person contact, comply with judicial administrative orders put into place and in response to the heightened pandemic status at the time of trial, and to protect everyone that enters the courthouse. *Id.* at ¶ 24. Similar sentiments were echoed by the Third District in *In re G.R.*, 3d Dist. Seneca No. 13-22-03, 2022-Ohio-3779. The Third District adopted this Court's position that, "[d]uring this public-health emergency, a judge's priority must be the health and safety of court [**31] employees, trial participants, jurors, and members of the public entering the courthouse." *In re G.R.*, 3d Dist. Seneca No. 13-22-03, 2022-Ohio-3779, ¶ 35 citing *In re Disqualification of Fleegle*, 161 Ohio St.3d 1263, 2020-Ohio-5636, 163 N.E.3d 609 ¶ 8.

Thus, there is ample support to conclude that reasons relating to the COVID-19 pandemic are sufficient case-specific reasons to allow an out-of-state witness to testify remotely.

VI. The use of remote testimony did not violate the defendant's right to confront Michael Mullins

Here there were case specific reasons justifying important state interests and public policy. Judicial notice can be taken that at the time of trial the country had just experienced a surge leading to an all-time high of cases of COVID-19. In reading the entire transcript of Mullins testimony, it can be easily determined that Mullins' answers responded to the questions asked of him. He was placed under oath, subjected to cross-examination, and there was no indication that the defendant could not see his demeanor. Therefore, the issue of whether Mullins was using help from a text-to-speech feature is a red herring in that the transcript shows that Mullins understood the questions asked of him, his answers were responsive, and the method was otherwise reliable. Again, as the Third District held:

> Here, even if we were to assume without deciding that the possibility of inclement weather was insufficient to warrant an exception for Mullins's video-conferenced testimony, we nevertheless conclude that the trial court's determinations were justified on a case-specific finding based upon an important public policy involving the Covid pandemic. Indeed, Carter's memorandum contra to the State's motion detailed Kentucky's, Minnesota's, and Ohio's Covid-case data for a seven-day average. That data reflected that Minnesota's seven-day average was *more than* three times the Ohio Covid-case average. Thus, it is evident to us that the trial court considered the needs of the public and the trial court including all staff, the attorneys, and most importantly, members of petit jury, from exposure to Covid.
>
> In addition to the foregoing, we recognize this is not an issue of witness convenience, but rather, the trial court's duty to protect those who come and go from the courthouse and to maintain the orderly administration of trial proceedings.
>
> [***]
>
> Accordingly, we conclude that under the specific facts and circumstances of this case, the use of two-way-live-video-conferencing allowing Mullins to testify from out-of-state, did not violate Carter's right to confrontation. Here, Mullins's two-way-live-video-conference call preserved the reliability elements of confrontation given that he testified under oath; he was subject to cross-examination; and, the jury and Carter could observe his demeanor while testifying. We find no error in admitting this testimony. Hence, there is no merit to the first portion of Carter's argument.

State v. Carter, 3d Dist. Logan No. 8-22-12, 2022-Ohio-4559, ¶ 16-17, 19 (internal citations omitted).

VII. **Appellant was not unduly prejudiced by Mr. Mullins' remote testimony**

For the sake of argument, assuming that the record does not support Mr. Mullins remote testimony, Appellant still needs to establish sufficient prejudice to overturn his convictions. Confrontation clause claims are also subject to harmless-error analysis. *State v. McKelton,* 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, at ¶192. Appellant cannot make this showing here. Mullins gave fairly brief testimony that Appellant admitted engaging in consensual sex with his adoptive daughter after she turned 18. Before, Mullins testified remotely, Penhorwood testified as to Appellant's unwitting admission. Penhorwood brought this tacit admission forward. Cumulative to this Mullins testified that Appellant admitted to having consensual sex with N.C. after she turned 18. This is still a sexual offense. But most important in Appellant's prosecution is that N.C. testified in court and Appellant had the opportunity to examine her. With that said, there is no basis to vacate Appellant's conviction and order a new trial.

CONCLUSION

The OPAA, in support of the State of Ohio, urges the Court to affirm the judgment of the Third District Court of Appeals.

Respectfully submitted,

MICHAEL C. O'MALLEY (#0059592)
CUYAHOGA COUNTY PROSECUTOR

/s/ Daniel T. Van
BY: _____
DANIEL T. VAN (0084614)
KRISTEN HATCHER (0093864)
Assistant Prosecuting Attorneys
Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

CERTIFICATE OF SERVICE

A copy of the foregoing has been sent this 1st day of August 2023 to Eric Stewart at eric@co.logan.oh.us and Samuel H. Shamansky at shamanskyco@gmail.com.

/s/ Daniel T. Van
DANIEL T. VAN (0084614)