

Can a Texas Criminal Jury Trial Occur by Video Conference, Absent a Defendant's Consent?

No. Absent a defendant's consent, the U.S. Constitution, the Texas Constitution and Texas statutes, all prohibit such a proceeding. In the history of Texas, no criminal jury trial has taken place by video conference.

Even before the Texas or United States constitutions, the King James Version of the Bible quoted the Roman governor Festus as declaring: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him. Acts 25:16. This right to confrontation continued into English common law, and eventually became the basis today for the Confrontation Clauses of the Sixth Amendment to the U.S. Constitution and TEX. CONST. ART.1,§10.

Over approximately the last 2,000 years, some exceptions have developed to the right of confrontation, but each applied to a single witness in a particular situation, never an entire trial. The advent of technology has not changed that. As Justice Scalia stated, in rejecting a proposed amendment to the Federal Rules of Criminal Procedure, which would have allowed some remote witnesses, "Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones." *See* Richard D. Friedman, *Proposed Amendments to FED. R. CRIM. P. 26: An Exchange: Remote Testimony* (U. of Michigan Law School Scholarship Repository, Summer 2002), quoting Scalia, J., at 703. <https://repository.law.umich.edu/articles/158>. The late Justice also noted, "[A] purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations *in the defendant's presence* – which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant's image." *Id*, at n. 18.

In *Romero v. State*, 173 S.W.3d 502, 505 (Tex. Crim. App. 2005), the Court of Criminal Appeals held that there are four elements to confrontation: (1) physical presence, (2) the oath, (3) cross-examination, and (4) observation of demeanor by the trier of fact.¹ The U.S. Supreme Court has allowed only a single substitute for the element of physical presence -- when a child-victim's testimony in the courtroom "will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." *Maryland v. Craig*, 497 U.S. 836, 841 (1990).

That rule is witness-specific. There are no other exceptions that would allow an entire trial to take place remotely by video. The Court of Criminal Appeals later reiterated: "And, in ringing terms, the Supreme Court declared that, 'under no circumstances' shall the defendant be deprived of 'seeing the witness face to face, and ... subjecting him to the ordeal of cross-examination.'" *Coronado v. State*, 351 S.W.3d 315, 329 (Tex. Crim. App. 2011), quoting *Crawford v. Washington*, 541 U.S. 36 (2004). Equally important, is for the jury to see that dynamic without any filter.

¹ Taken together, the elements of "physical presence" and "observation of demeanor by the trier of fact," clearly imply that remote juries are not acceptable either.

Beside the constitutional case law, Texas statutes and rules simply have no procedure for a video conference criminal jury trial. Of those laws that do allow the use of video conference proceedings in Texas, all but one require consent of the parties. *See* TEX. CODE CRIM. PRO. ART. 27.18 Plea or Waiver Rights by Videoconference (“file with the court written consent”); ART. 38.076 Testimony of Forensic Analyst by Video Teleconference (“approved by the court and all parties”). The only one that does not require a defendant’s consent is TEX. CODE CRIM. PRO. ART. 38.071 Testimony of Child Who is Victim of Offense. This law mirrors *Maryland v. Craig, supra*, by limiting its use to children, younger than 13-years-old, who are victims of a limited type of offenses, and once a judge finds they are unavailable to testify. *Coronado, supra*.

Other statutes would need to be changed to allow a video conference jury trial to proceed. TEX. CODE CRIM. PRO. ART. 35.17 requires that, other than in a capital case, voir dire examination be “in the presence of entire panel.” ART. 37.06 mandates that the defendant must be present when the verdict is read. Use of the word “present” or “presence” in these laws is clearly not metaphorical.

Last, it is important to think about all the practical reasons why a video conference trial is unacceptable. Most of the issues related to confrontation have to do with whether an accusing witness is credible. Judgments about credibility can be influenced by how fluidly the person speaks, their eye contact, gaze, body language and inflections, all of which can be lost or distorted in a two-dimensional field by buffering or minuscule gaps. Anyone who watches nightly news knows remote interviews often involve persons talking over one another because the timing is truncated.

Credibility of witnesses is only one aspect that can be changed. Colors, lighting, height depth and other characteristics, look different on a screen. Criminal jury trials are often about the identity of a defendant. An old adage in the entertainment business is that television adds 10 pounds to anyone appearing on screen. An image of the defendant may approximate the description of the perpetrator, yet not in real life. The televised exhibits may resemble, more or less closely, a witness’s description rather than if seen in the courtroom.

Probably, the most dangerous aspect to lose is empathy. As Justice Scalia alluded to above, the defendant becomes a television character, not a real person. Although jurors will not be as distanced from the case as an audience watching “Law and Order,” it is much more difficult to relate to a person televised on a screen. The stakes of liberty are too high to risk convicting someone based upon two-dimensional evidence.

There are no good legal or practical reasons for virtual criminal jury trials over a defendant’s objection. Emergencies occur and cases may need to be continued, but shortcuts should not be applied merely because of convenience. As the Texas Court of Criminal Appeals stated, “There is no ‘balancing’ the defendant’s constitutional right of confrontation and cross examination against other social policies, even compelling ones.” *Coronado, supra*, at 329.

Alex Bunin, Chief Defender, Harris County Public Defenders Office