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If The Mask Fits: The Unconstitutionality of Face Masks in Criminal Trials During COVID-19

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I. INTRODUCTION

Society, and certainly the courts, did not have time to prepare and adapt to the unprecedented COVID-19 (coronavirus) pandemic before the effects of the pandemic swept through the nation. The first coronavirus case within the United States was reported on January 20, 2020.[1] The coronavirus spread at an alarming rate, and by March 11, 2020, the World Health Organization (WHO) declared the coronavirus a pandemic.[2] Just two days later, the President of the United States, Donald Trump, declared a National Emergency.[3] By January 10, 2021, the United States faced 21,761,186 cumulative cases and 365,886 total deaths from the coronavirus.[4]

In the wake of the rapidly spreading virus, stay-at-home and shelter-in-place orders went into effect in the majority of states by late March

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1 Michelle L. Holshue, M.P.H., et. al., *First Case of 2019 Novel Coronavirus in the United States*, THE NEW ENGLAND JOURNAL OF MEDICINE, https://www.nejm.org/doi/full/10.1056/NEJMoa2001191 (last visited Jan. 1, 2021).

2 AJMC Staff, *A Timeline of COVID-19 Developments in 2020*, AJMC, https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020 (last visited Jan. 1, 2021).

3 Donald J. Trump, *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, THE WHITE HOUSE, https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/ (last visited Jan. 1, 2021).

4 *United States of America Situation*, WORLD HEALTH ORGANIZATION, https://covid19.who.int/region/amro/country/us (last visited Jan. 10, 2021).

2020.[5] By the end of March, the vast majority of state supreme courts announced judicial emergencies, closed their doors, postponed proceedings, or limited court activity to various degrees.[6] The Supreme Court of Georgia issued an Order Declaring Statewide Judicial Emergency[7] on March 14, 2020, which has been extended ten times with various amendments and is still in effect as of January 10, 2021.[8] In addition, various courts across the nation individually issued "orders relating to court business, operating status, and public and employee safety" in the months following the coronavirus outbreak.[9] Specifically, all of Georgia's United States District Courts[10] entered various orders implementing new procedures in response to the coronavirus, including suspending court proceedings and enforcing new health and safety protocols.[11] Beginning in March 2020, the United States Court of Appeals for the Eleventh Circuit introduced live-streaming for oral arguments,

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5 Sarah Mervosh, et. al., *See Which States and Cities Have Told Residents to Stay at Home*, THE NEW YORK TIMES, https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html (archived as of Apr. 20, 2020).

6 *State court closures in response to the coronavirus (COVID-19) pandemic between March and November, 2020*, BALLOTPEDIA, https://ballotpedia.org/State_court_closures_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020 (archived as of Nov. 4, 2020).

7 Chief Justice Harold D. Melton, *Order Declaring Statewide Judicial* Emergency, SUPREME COURT OF GEORGIA, https://www.gasupreme.us/wp-content/uploads/2020/03/CJ-Melton-amended-Statewide-Jud-Emergency-order.pdf (last visited Jan. 1, 2021).

8 *Court Information Regarding The Coronavirus*, SUPREME COURT OF GEORGIA, https://www.gasupreme.us/ (last visited Jan. 10, 2021).

9 *Judiciary Preparedness for Coronavirus (COVID-19)*, UNITED STATES COURTS, https://www.uscourts.gov/news/2020/03/12/judiciary-preparedness-coronavirus-covid-19 (archived as of June 3, 2020). The United States District Court for the Northern District of Georgia's courthouse in Rome, Georgia, was one of the first district courts to close their courthouse in the nation after an employee contracted symptoms of the coronavirus on March 18, 2020. *Id.*

10 *Courts in Georgia*, BALLOTPEDIA, https://ballotpedia.org/Courts_in_Georgia#Federal_district_courts (last visited Jan. 10, 2021).The United States District Court for the Northern District of Georgia, the United States District Court for the Middle District of Georgia, and the United States District Court for the Southern District Court of Georgia are the three federal district courts in Georgia.

11 *Time Periods in General Order 20-01 Further Extended Through January 3, 2021*, UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF GEORGIA, http://www.gand.uscourts.gov/news/time-periods-general-order-20-01-further-extended-through-january-3-2021 (last visited Jan. 10, 2021); *COVID 19: Public Health and Safety*, UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF GEORGIA, https://www.gamd.uscourts.gov/news/covid-19-public-health-and-safety (last visited Jan. 10, 2021); *COVID-19*, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, https://www.gasd.uscourts.gov/covid-19 (last visited Jan 10, 2021).

limited access to the courthouse, and suspended paper filing requirements.[12] The Supreme Court of the United States closed to the public indefinitely beginning March 12, 2020, while also postponing oral arguments for March and April 2020.[13]

With courts at all levels in stalemate for months, many courts have implemented creative and untraditional court procedures to allow cases to move forward during the coronavirus pandemic. While some courts are allowing for alternatives to in-person court appearances by remote videoconferencing,[14] many courts are beginning to reopen with the condition that those in the courtroom wear masks and keep space between each other.[15] It is becoming common practice for courts to implement new safety and health measures to prevent the spread of the coronavirus while allowing cases to continue in-person.[16]

Naturally, a shock has hit the judicial system. Courtrooms across the nation are rapidly transitioning to ensure all occupants are distanced and all parties are wearing face coverings. The fear of spreading the coronavirus is on everyone's minds. In such unprecedented times, necessary protections such as masks seem essential. Nonetheless, hiding a witness's face behind a mask raises serious questions: What about tradition? What about precedent? What about the Constitution? The right to *face* an accuser at trial is a hallmark of the American justice

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12 Chief Judge Ed Carnes, *GENERAL ORDER NO. 45 Oral Arguments By Audio or Teleconferencing*, IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/GeneralOrder45.pdf (last visited Jan. 10, 2021); Chief Judge Ed Carnes, *GENERAL ORDER NO. 44 RESTRICTIONS ON VISITORS TO THE COURT AND TEMPORARY SUSPENSION OF PAPER FILING REQUIREMENTS*, IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/GeneralOrder44.pdf (last visited Jan. 10, 2021).

13 Tucker Higgins, *Supreme Court postpones arguments because of coronavirus, citing Spanish flu precedent*, CNBC, https://www.cnbc.com/2020/03/16/supreme-court-postpones-arguments-over-coronavirus.html (last visited Jan. 10, 2021).

14 William M. Droze & Ashley Cameron, *Litigating in the Age of COVID-19*, TROUTMAN PEPPER, https://www.troutman.com/insights/litigating-in-the-age-of-covid-19.html (last visited Jan. 10, 2021).

15 *As Courts Restore Operations, COVID-19 Creates a New Normal*, UNITED STATES COURTS, https://www.uscourts.gov/news/2020/08/20/courts-restore-operations-covid-19-creates-new-normal (last visited Jan. 10, 2021).

16 *Id.* "For more than 230 years, the federal Judiciary has spanned the horseback era to the internet age, but in one key aspect it has never changed. Just as in the nation's earliest years, the Constitution still requires federal courts to conduct many critical legal proceedings in person." *Id.*

system.[17] The very foundation and traditions of our court system are being questioned and pushed.

As new, untraditional, and unprecedented court procedures are implemented, courts at all levels must tread lightly when making changes to the criminal trial process. The Bill of Rights includes the all-important Sixth Amendment,[18] which aims to protect the rights of a criminal defendant while defending his liberties during trial. As criminal proceedings are resuming in-person and with masks, every American court should concern itself with serious violations of the Sixth Amendment Confrontation Clause, which provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[19] A crucial issue beginning to emerge for all courts across the nation is whether confronting a witness whose face is covered with a mask is a violation of the Constitution under the Confrontation Clause.[20] United States Supreme Court precedent regarding the importance of and requirements of the Confrontation Clause, as well as lower court decisions regarding facial disguises during criminal trials, provide some guidance. Nonetheless, there is no conclusive answer to the newfound requirement of wearing masks.

Though no conclusive answer has specifically been provided on the constitutionality of wearing masks during criminal trials, this Comment will show that the Supreme Court in *Crawford v. Washington,*[21] solidified the criminal defendant's right to confront the witnesses against him face-to-face and limited the possibility for exceptions to this right. The *Crawford* decision established that judges should not be permitted to make subjective judgments overriding the Constitutional protections of criminal defendants, leaving little room for courts to make changes to the right to face-to-face confrontation, even in such instances as a global pandemic.

This Comment takes the position that having witnesses in criminal trials wear face masks violates the Confrontation Clause. The recent Confrontation Clause jurisprudence of the United States Supreme Court, specifically in *Crawford*, makes clear the Sixth Amendment requires face-to-face confrontation in the most literal sense, which cannot be dispensed with at the discretion of judges. Part I provides an introduction to the novel coronavirus and sets the framework for a discussion of the

17 *Id.*

18 U.S. Const. amend VI.

19 *Id.*

20 *See* United States v. Crittenden, No. 420-CR-7 (CDL), 2020 U.S. Dist. LEXIS 151950 (M.D. Ga. Aug. 21, 2020).

21 541 U.S. 36 (2004).

unconstitutionality of face masks during criminal trials. Part II looks at the history of the Confrontation Clause, specifically the right to face-to-face confrontation; precedent set by the Supreme Court answering Confrontation Clause questions; and various federal circuit and state court approaches to face coverings under the Confrontation Clause. Part III analyzes an order from the United States District Court for the Middle District of Georgia that addresses the constitutionality of face masks at criminal trials during the global pandemic. Part IV addresses the appropriate Supreme Court test, the *Crawford* test, which supports the determination that masks are unconstitutional during criminal trials; the potential impacts on criminal defendants if mask-wearing witnesses are permitted to testify; and the potential remedies to ensure the health and safety of participants without using face masks.

II. HISTORY

A. Origin of Face-to-Face Confrontation

The concept behind the Confrontation Clause and the right to face-to-face confrontation goes back long before the drafting of the Constitution "with lineage that traces back to the beginnings of Western legal culture."[22] The Supreme Court has stated, and shown respect for, the fact that the right to face-to-face confrontation comes from deep historical roots, dating back as far as Roman Law.[23] The Roman Governor Festus, between the years 80 and 90, was quoted stating: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the chargers."[24]

Centuries later, Sir Walter Raleigh's infamous trial in England in 1603 raised questions as to the right of an accused to confront the witness against him.[25] After allegations of treason, Raleigh "demanded that the judges call [the witness] to appear, arguing that 'the Proof of the Common Law is by witness and jury: let [the witness] be here, let him speak it. Call my accuser before my face . . . .'"[26] Raleigh's demand was denied, and he was sentenced to death.[27] After cries of injustice, English statutory and judiciary reform took place, developing the common law right to

22 Coy v. Iowa, 487 U.S. 1012, 1015 (1988).

23 *Crawford*, 541 U.S. at 43; *Coy*, 487 U.S. at 1015.

24 *Coy*, 487 U.S. at 1015–16 (quoting Acts of the Apostles 25:16).

25 *Crawford*, 541 U.S. at 44.

26 *Id.* (quoting 2 How. St. Tr., at 15–16 (1603)).

27 *Id.*

confrontation and specifically requiring witnesses to confront the accused face-to-face.[28]

In the United States, by the time of the Declaration of Independence, many states had individually adopted the right to confrontation.[29] The drafters of the Constitution of the United States of America, however, did not originally include the right to confrontation in the Constitution.[30] In response to this omission, Abraham Holmes at the Massachusetts ratifying convention expressed concern that "whether [the defendant] is to be allowed to confront the witnesses and have the advantage of cross-examination, we are not yet told . . . ."[31] In addition, a well-known Antifederalist, the "Federal Farmer," wrote "Nothing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question . . . ."[32] Following these public concerns, the First Congress in 1789 passed and proposed for ratification the Confrontation Clause in the Sixth Amendment.[33]

The right to face-to-face confrontation in criminal trials has since remained a longstanding tradition in the United States. The reason face-to-face confrontation has persisted throughout centuries is based on the "profound effect" of a witness facing the person the witness is accusing.[34] There "is something deep in human nature" which makes it essential to have a face-to-face meeting during a criminal trial; the right to confrontation is "essential to fairness."[35] Furthermore, inherent in human nature is that "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'"[36] When forced to face the man he accuses, the witness's "demeanor upon the stand and the manner in which he gives his testimony [shows] whether he is worthy of belief."[37] To force the witness to look upon the defendant, the witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is."[38] As President Eisenhower profoundly stated, "In this country, if someone dislikes you,

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28 *Id.*

29 *Id.* at 48.

30 *Id.*

31 *Id.* (quoting 2 Debates on the Federal Constitution 110–111, J. Elliot 2d ed. 1863).

32 *Id.* at 49 (quoting R. Lee, Letter IV by the Federal Farmer (Oct. 12, 1787)).

33 *Id.* at 49.

34 *Coy*, 487 U.S. at 1020.

35 *Id.* at 1017–19.

36 *Id.* at 1019.

37 Mattox v. United States, 156 U.S. 237, 242–43 (1895).

38 Jay v. Boyd, 351 U.S. 345, 375–76 (1956) (Douglas, J., dissenting).

or accuses you, he must come up in front. He cannot hide behind the shadow."[39] Not surprisingly, the Supreme Court has always upheld the notion that the Confrontation Clause guarantees a criminal defendant the right to meet face-to-face the witnesses against him.[40]

B. Supreme Court Precedent: The Confrontation Clause

With that said, the Supreme Court has not held the right to face-to-face confrontation is an *absolute* right and has, at times, dispensed with a defendant's right to face-to-face confrontation. Although there is substantial precedent upholding the importance of face-to-face confrontation, precedent on whether and when it is permissible to admit testimony that is *not* face-to-face is contradictory.

1. Coy: Face-to-Face Confrontation and the Placement of a Screen

In *Coy v. Iowa*,[41] the Supreme Court emphasized the fundamental importance of a defendant's right to confrontation when holding unconstitutional the placement of a screen between the defendant and witnesses during trial testimony.[42] In *Coy*, the two witnesses, two 13-year-old girls, alleged that the defendant had sexually assaulted them. That same year, the state of Iowa enacted a statute that allowed witnesses, by motion, to testify behind a screen during criminal trials. The State made a motion for the use of the screen between the testifying witnesses and the defendant, a motion which the defendant strenuously objected to, arguing the screen violated his confrontation rights.[43] The State argued that the use of the screen was necessary based on Iowa's statutory presumption that child victims will be traumatized testifying before an alleged defendant.[44] The trial court allowed the use of the "large screen" to be placed between the defendant and the two witnesses while the two alleged victims testified.[45] The screen itself only allowed the defendant to "dimly . . . perceive the witnesses, but the witnesses to see him not at all."[46]

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39 *Coy*, 487 U.S. at 1017–18.
40 *Id.* at 1016.
41 487 U.S. 1012 (1988).
42 *Id.* at 1022.
43 *Id.* at 1014–15.
44 *Id.* at 1021.
45 *Id.* at 1014.
46 *Id.* at 1015.

The Supreme Court in *Coy* held the use of a screen to block the witnesses from view while on the witness stand was unconstitutional.[47] The Court in *Coy* supported its decision by holding the language of the Confrontation Clause "[s]imply as a matter of Latin" and "'[s]imply as a matter of English,' [] confers at least 'a right to meet face to face all those who appear and give evidence at trial.'"[48] Hence, based on the clear language of the clause, the Supreme Court has never before doubted the Confrontation Clause guarantees the right to a face-to-face meeting between the witness and defendant.[49]

In response to the State's argument that the victims will presumptively be traumatized having to face their accuser, the Court recognized the truthful victim may, unfortunately, become upset while in the face-to-face presence of the defendant.[50] However, despite the fact that confronting the defendant to his face may upset the witness, the defendant has a constitutional right to this confrontation.[51] Alas, "[i]t is a truism that constitutional protections have costs."[52] The constitutional right of face-to-face confrontation has a profound purpose "[t]he State can hardly gainsay . . . ."[53] Specifically, face-to-face confrontation may establish the alleged trauma of the witness, or it may undo a false accuser or reveal a coached child.[54] Therefore, the Court in *Coy* held the defendant's right to confrontation must prevail and allow for face-to-face confrontation and omit testimony while hidden behind a screen.[55]

The Court does, however, go further to hold that despite its decision, the rights conferred in the Confrontation Clause are not absolute rights, and exceptions have been created by the Supreme Court.[56] Looking to precedent, all previous exceptions to confrontation, however, were permitted in cases where the rights at issue were implied rights found in the Confrontation Clause,[57] not those rights "narrowly and explicitly set

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47 *Id*. at 1022.

48 *Id*. at 1016 (quoting California v. Green, 399 U.S. 149, 175 (1970)).

49 *Id*.

50 *Id*. at 1020.

51 *Id*.

52 *Id*.

53 *Id*.

54 *Id*.

55 *Id*. at 1022.

56 *Id*. at 1020.

57 *Id*. The Supreme Court held the implied rights in the Confrontation Clause that are reasonably susceptible to sway by important interests are: 1) the right to cross-examine; 2) the right to exclude statements made out-of-court; and 3) the right to face-to-face confrontation during the proceedings but not at the actual trial. *Id*. These implied rights in the Confrontation Clause must make take into consideration and give way to reasonably

forth in the Clause."[58] Essentially, the Court has not previously created or permitted exceptions to "the irreducible literal meaning of the Clause: 'a right to *meet face to face* . . . .'"[59] The *Coy* Court declined to find any exceptions to face-to-face confrontation in the case before the Court, but allows for the possibility.[60] The Court held any possible exceptions to the right to face-to-face confrontation "would surely be allowed only when necessary to further an important public policy."[61] Although no exception to face-to-face confrontation was provided by the Court, the *Coy* Court still provided guidance on what is sufficient to create an exception to this right. Any exception would need to be "something more than [a] type of generalized finding" and must be based on "individualized findings" to create a "conceivable exception."[62] An argument based on the presumptive findings of a general statute is insufficiently individualized to the case to create an exception.[63]

2. Craig: Reliability and Public Policy

Just two years after the decision in *Coy*, the Court in *Maryland v. Craig*,[64] held constitutional the testimony of a witness who did *not* testify face-to-face with the defendant.[65] In *Craig*, the defendant was accused of various crimes, including child abuse. The State motioned for a statutory procedure that permits an alleged victim of child abuse to testify via one-way video stream. To permit the procedure, the trial judge had to make an individualized finding that the child will experience such emotional distress that the child will be unable to reasonably communicate while testifying in the courtroom. The defendant objected to the use of the procedure based on her rights under the Confrontation Clause.[66] The trial judge, however, found, although face-to-face confrontation is denied under the statutory procedure, the "essence of the right of confrontation" remains because the defendant and jury can still observe the witness, and the defendant's counsel can still cross-examine the witness.[67]

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important interests. *Id.* However, the Court had not previously held that the rights expressly stated in the Confrontation Clause, like the right to meet face-to-face, can give way to other important interests. *Id.* at 1021.

58 *Id.* at 1020.

59 *Id.* at 1021 (quoting *California*, 399 U.S. at 175).

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.*

64 497 U.S. 836 (1990).

65 *Id.* at 846.

66 *Id.* at 840–42.

67 *Id.*

Thereafter, the trial court found the evidence—including the testimony of an expert witness—was sufficient to invoke the procedure and allowed the child victim to testify over a one-way video circuit. Under the procedure, the child was cross-examined in a separate room while a video monitor displayed the testimony in the courtroom for the defendant, jury, and judge to view. The defendant only saw the witness over television streaming, and the witness never saw the defendant at all.[68]

Because the trial court denied face-to-face confrontation based on individualized findings consistent with *Coy*,[69] it "require[d] [the Supreme Court] to decide the question reserved in *Coy*," specifically, whether an exception exists to face-to-face confrontation.[70] To answer this question, the *Craig* Court held the "central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant."[71] Reliability under the Confrontation Clause is not just based on face-to-face confrontation, but "[t]he combined effect of these elements of confrontation—physical presence, oath, cross-examination, and observation of the demeanor by the trier of fact—serves the purpose of the Confrontation Clause . . . ."[72] Therefore, the right to face-to-face confrontation is not the "*sin qua non*"[73] of the defendant's right to confrontation, and the confrontation rights of a defendant must be interpreted in light of the necessities of the trial and other reliability elements.[74] The right to face-to-face confrontation, according to the *Craig* Court, is simply a "*preference*."[75]

After finding face-to-face confrontation is not required in every instance of testimony against a defendant, the *Craig* Court turned to the *Coy* Court's requirement that, to create an exception to face-to-face confrontation, there must be a necessary public policy interest to further.[76] Only "occasionally" does the preference for face-to-face

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68 *Id.* at 841–43.

69 *Id.* at 845. The Court in *Coy* held for an exception to exist to face-to-face confrontation, a court must make an individualized finding of necessity for some important public policy reason. *Coy*, 487 U.S at 1021.

70 *Craig*, 497 U.S. at 845.

71 *Id.*

72 *Id.* at 846.

73 *Id.* Black's Law Dictionary defines sine qua non as "An indispensable condition or thing; something on which something else necessarily depends." Sine qua non Definition, *Black's Law Dictionary* (8th ed. 2004).

74 *Craig*, 497 U.S. at 850.

75 *Id.* at 849 (quoting Ohio v. Roberts, 448 U.S. 56, 63 (1980)).

76 *Id.* at 850.

confrontation give way to public policy.[77] The public policy exception must be necessary in light of the case before the court.[78]

Applying the reliability test and public policy inquiry to the case in *Craig*, the Court held the testimony was still reliable because the witness was placed under oath, cross-examined, and observed by the trier of fact—although through a video stream.[79] Next, the State's specific policy interest in protecting the child witness from seeing her alleged accuser after expert testimony found the witness would suffer "serious emotional distress" outweighed the defendant's right to face her accuser.[80] The Court also reaffirmed that in every case where the defendant's right to face-to-face confrontation is hindered, the court must provide a case-specific finding of necessity.[81] Therefore, to find an exception to face-to-face confrontation under *Craig*, courts should focus on the reliability of evidence and the public policy interest in preventing a face-to-face meeting in each case.[82]

3. Crawford: Rejecting Reliability Tests

Over a decade after the decision in *Craig,* the Supreme Court in *Crawford v. Washington*,[83] again analyzed the right of a criminal defendant under the Confrontation Clause, but this time in the context of a hearsay exception.[84] Although not directly dealing with in-person trial testimony, the Court in *Crawford* took the opportunity to make broad holdings about the importance of a defendant's right to confrontation.[85] Most notably, the Court held the Sixth Amendment does not provide for "open-ended exceptions from the confrontation requirement to be developed by the courts[,]" including exceptions created based on the reliability of testimony.[86]

The *Crawford* Court specifically focused on a prior Supreme Court decision, *Ohio v. Roberts*,[87] which did not align with the original meaning of the Confrontation Clause as interpreted by the Founders and as

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77 *Id.* at 849.
78 *Id.* at 850.
79 *Id.* at 851–52.
80 *Id.* at 842–55.
81 *Id.* at 857–58.
82 *Id.* at 850.
83 541 U.S. 36 (2004).
84 *Crawford*, 541 U.S. at 40.
85 *Id.* at 54.
86 *Id.*
87 448 U.S. 56 (1980).

established in century-old precedent.[88] In *Roberts*, the Supreme Court held that the admission of out-of-court testimony required a judicial determination of whether the testimony falls under a hearsay exception or has an "indicia of reliability."[89] The *Roberts* test, therefore, allowed courts to admit or deny testimony based on reliability.[90] The *Crawford* Court held, under the Sixth Amendment, this "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."[91] Based on the Framers' intentions when drafting the Sixth Amendment, the *Crawford* Court held there is no reliability exception regarding the right of confrontation, and only those exceptions that still meet the intent of the Framers are permissible.[92]

The *Crawford* Court took issue with and overturned the *Roberts* reliability test for two crucial reasons.[93] First, the *Roberts* test allowed judges to consider and weigh reliability elements, which could easily lead to different results based on the judge overseeing the trial, causing unpredictability.[94] Second, and most importantly, the *Roberts* test allowed for the admission of testimony the Confrontation Clause should

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88 *Crawford*, 541 U.S. at 60. *See Mattox*, 156 U.S. at 243; Motes v. United States, 176 U.S. 458 (1900).

89 *Roberts*, 448 U.S. at 66.

90 *Crawford*, 541 U.S. at 62.

91 *Id.*

92 *Id.* at 54–61. The intentions of the Framers can be traced to precedent set by the Supreme Court as far back as 1895. *Crawford*, 541 U.S. at 54–58; *see* Mattox v. United States, 156 U.S. 237 (1895). The Court in *Mattox*, premising its decision on the law existing at the time of the Constitution, held a defendant must have the opportunity to cross-examine a witness prior to trial to admit out-of-court testimony. *Crawford*, 541 U.S. at 57; *Mattox*, 156 U.S. at 242. The right of confrontation is meant to preserve the right of face-to-face testimony and to subject the witness "to the ordeal of cross-examination." *Mattox*, 156 U.S. at 244. Just five years later in 1900, the Supreme Court also stood for the proposition that out-of-court testimony which fails to prove the unavailability of a witness should be excluded. *Crawford*, 541 U.S. at 57; Motes v. United States, 178 U.S. 458, 473–74 (1900). In *Motes*, the prosecution submitted a statement by a witness that was available for cross-examination by the defendants previously but did not present the witness at trial, failing to prove unavailability. *Motes*, 178 U.S. at 470–71. Therefore, based on *Mattox* and *Motes*, the intent of the Framers was to ensure the right to cross-examination and in-person testimony except when the witness is unavailable.

93 The Court in *Crawford* did not clearly express its decision to overrule *Roberts*. However, in a subsequent Supreme Court case, the Court confirmed its intention in *Crawford* was to overturn *Roberts* when expressly holding "our opinion in *Crawford* . . . overruled *Roberts*." Whorton v. Bockting, 549 U.S. 406, 413 (2007).

94 *Crawford*, 541 U.S. at 63.

exclude simply because the testimony is "reliable."[95] Therefore, the Court in *Crawford* held weighing reliability factors at the discretion of judges "reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion."[96] The Court in *Crawford* ruled against judicial discretion under the Confrontation Clause and dispensed with the *Roberts* reliability test.[97]

However, the *Crawford* Court did not address the *Craig* reliability test. Although *Craig* focused on in-person testimony, not hearsay as in *Crawford*, the *Crawford* Court generally held against judges using their discretion to create exceptions to a defendant's very constitutional rights under the Confrontation Clause. Therefore, trying to reconcile *Craig* and *Crawford* poses serious questions about the level of discretion judges have to create exceptions to the right to confrontation, both when balancing reliability elements and when inquiring into public policy.

C. Circuit Court Cases & State Court Cases: Facial Coverings and Disguises

Recent circuit court and state court cases have specifically dealt with witnesses covering all or some of their faces while on the witness stand. These cases shed light on how jurisdictions have interpreted Supreme Court precedent on the Confrontation Clause. Most notably, the cases' interpretations highlight the inconsistent results that circuit courts and state courts have reached about what Supreme Court case and test to apply in facial disguise cases.

1. The Second Circuit in Morales

The Court of Appeals for the Second Circuit in *Morales v. Artuz*,[98] analyzed the right to face-to-face confrontation in a case where the witness testified while wearing dark sunglasses.[99] The witness was at the trial to give eye-witness testimony after claiming to have seen the defendant shoot the victim; the State's case strongly rested on this eye-witness testimony. The witness testified at the first trial wearing sunglasses. The first trial, however, resulted in a hung jury, and, during

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95 *Id.*

96 *Id.* at 67.

97 *Id.* 68–69. The Supreme Court has continued to support its holdings in *Crawford* in post-*Crawford* cases which specifically reject the use of a reliability test to create Confrontation Clause exceptions. *See* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 317–18, (2009).

98 281 F.3d 55 (2nd Cir. 2002).

99 *Id.* at 56.

the second trial, the witness wished to wear sunglasses again while testifying.[100]

At the second trial, the defense counsel objected to the witness wearing sunglasses, and the trial judge sustained the objection.[101] The trial judge found that the witness shielding her face with dark sunglasses prevented anyone in the courtroom from seeing through them, which "d[id] not provide the defendant with adequate opportunity to examine [the witness] and it d[id] not provide the jurors with the opportunity to evaluate [the witness's] credibility."[102] The witness nonetheless refused to take the sunglasses off, even upon the judge's order that she remove them.[103] Eventually, the trial judge relented and allowed the witness to wear the sunglasses based on the necessity of the witness's testimony, but recognized the dark sunglasses "'partially' [infringed] the defendant's right to confrontation."[104]

The Second Circuit, in reviewing the case, recognized the right to confrontation is clearly established by the Supreme Court, but when the witness is minimally disguised, Supreme Court precedent is less clear.[105] Both *Craig* and *Coy* provided a test for admissibility when the witness was in some way physically separated from the defendant, but these cases did not provide an appropriate test when dealing with a "slight disguise . . . . Indeed, the Court has not considered any case involving a disguise that obscures the normal opportunity to observe all aspects of a witness's demeanor."[106] Even when turning to precedent for the virtues of the Confrontation Clause,[107] there seems to be contradictory values the Court has emphasized, preventing the *Morales* court from basing its

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100 *Id.* at 56–57

101 *Id.* at 57.

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.* at 58.

106 *Id.* at 58–59. *Morales* was decided before the *Crawford* decision. However, because *Crawford* did not directly deal with visual obstructions of the witness, the *Crawford* decision unlikely would have drastically changed the decision in *Morales*. If anything, *Crawford* would have led to more confusion as the *Crawford* Court introduced another Confrontation Clause holding which varies from other Supreme Court precedent, an inconsistency in precedent the *Morales* court already noted. *Id.*

107 *Morales*, 281 F.3d at 59. The *Morales* court cites various, seemingly conflicting Supreme Court decisions regarding the central value of face-to-face confrontation. (*see* Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987); Delaware v. Van Arsdall, 475 U.S. 673, 678 (1986)).

decision on the importance—or insignificance—of the visibility of the witness's eyes during testimony.[108]

Turning to the facts, the *Morales* court held, to the extent the Supreme Court has established the right of the defendant to see the witness, "some impairment occurred."[109] However, besides the inability to see the witness's eyes, the witness's full body was in view of the defendant and the trier of fact, allowing them to observe the witness's body language and to assess the delivery and credibility of her testimony.[110] The court in *Morales* determined all other bases for evaluating the witness's testimony were still in place; "[a]ll that was lacking was the jury's ability to discern whatever might have been indicated by the movement of her eyes."[111] Based on this finding, the *Morales* court determined that allowing the witness to wear sunglasses was permissible.[112] Notably, the court did not make any conclusive holdings on the defendant's right to confrontation when the witness is disguised, only doubting that the sunglass disguise violated the constitutional protections of the defendant under the Confrontation Clause, deferring to the lower court's application of the law.[113]

2. The Ninth Circuit in Jesus-Casteneda

The Court of Appeals for the Ninth Circuit in *United States v. De Jesus-Casteneda*,[114] addressed the constitutionality of a witness wearing a disguise under the Sixth Amendment.[115] The State asked that the witness be permitted to wear a fake mustache and wig during testimony because the witness was a confidential informant. The witness claimed

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108 *Morales*, 281 F.3d at 59. Depending on what the value of face-to-face confrontation is:

> [t]o the extent that the Supreme Court's 'established law' of confrontation seeks to assure cross-examination and an opportunity for the witness to the see the defendant, [the witness's] sunglasses created no impairment. On the other hand, to the extent that the right assures an opportunity for the defendant and especially the jurors to see the witness's eyes in order to consider her demeanor as an aid to assessing her credibility, some impairment occurred. *Id.* at 60.

109 *Id.*

110 *Id.* at 61–62.

111 *Id.* at 62. "[The jurors] had a full opportunity to combine these fully observable aspects of demeanor with their consideration of the substance of her testimony, assessing her opportunity to observe, the consistency of her account, any hostile motive, and all the other traditional bases for evaluating testimony." *Id.*

112 *Id.*

113 *Id.* The *Morales* court deferred to the finding of the state court to permit the testimony and held the, "the state court did not make an unreasonable application of such law[]" when permitting testimony of the sunglass-wearing witness. *Id.*

114 705 F.3d 1117 (9th Cir. 2013).

115 *Id.* at 1119.

the purpose of the disguise was to protect his identity due to the particular dangers of his involvement in the Sinaloa Cartel's drug trafficking ring. Defense counsel objected because the witness's disguise concealed his facial expressions, hindering the defendant and jury's ability to analyze the witness's demeanor and credibility. The trial court nonetheless found the witness could testify in disguise.[116] Based on the risks to the witness, the trial judge decided "the disguise was a 'very small impingement . . . on the ability . . . to judge . . . credibility.'"[117] The defendant appealed, contending the disguise violated his rights under the Confrontation Clause.[118]

As in *Morales*, the court in *Jesus-Casteneda* held there is no "Supreme Court authority addressing whether a witness's testimony in disguise violates the Confrontation Clause."[119] Instead, the *Jesus-Casteneda* court turned to analogous cases in other jurisdictions for guidance.[120] Focusing on a similar case in Texas which addressed facial disguises under the Confrontation Clause, [121] the *Jesus-Casteneda* court utilized the *Craig* test to determine whether the witness's facial disguise violated the defendant's confrontation rights.[122] Namely, the court considered the reliability elements[123] and considered whether there was an important state interest when determining the constitutionality of the disguise under the Confrontation Clause.[124]

The *Jesus-Casteneda* court held the disguise was constitutional under the *Craig* test because of the important state interest in protecting the witness's identity and safety.[125] Specifically, the witness was at particular risk against retaliation and exposure from the Sinaloa Cartel.[126] Furthermore, the court went on to determine all other elements of reliability were met with the witness testifying under oath, with the ability to cross-examine the witness by the defendant within the

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116 *Id.*

117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.*

121 *Id.* at 1120. Specifically, the court analyzed *Romero v. State*, 173 S.W.3d 502 (Tex.Crim.App.2005), which is addressed later in this Comment. *Id.*

122 *Jesus-Casteneda*, 705 F.3d at 1120.

123 *Id.* The court, in determining reliability, used the *Craig* test to consider the following elements 1) physical presence of the witness; 2) the witness under oath; 3) the prior opportunity to cross-examine the witness; 4) the right to observe the demeanor of the witness by the jury. *Id.*

124 *Id.*

125 *Id.*

126 *Id.*

defendant's view, with the jury's ability to see the demeanor of the witness, and with the witness's physical presence in the courtroom.[127] Based on the application of the *Craig* test, the court ruled the disguise did not violate the defendant's constitutional right to confrontation.[128]

3. The Texas Court of Appeals in Romero

In *Romero v. State*,[129] a Court of Appeals of Texas decision, the court held unconstitutional the testimony of a witness who wore a disguise of sunglasses, a baseball cap, and a jacket with an upturned collar while testifying.[130] The witness in the case refused even to enter the courtroom without the disguise, explaining he feared the defendant would seek revenge. The defendant's counsel immediately objected to the disguise as violating the defendant's constitutional right to face his accuser. The trial judge allowed the witness to testify in the disguise, and the defendant appealed based on violations of his confrontation right.[131]

In determining the appropriate test to apply to a facial disguise case,[132] the *Romero* court reviewed both *Coy* and *Craig*.[133] In *Craig*, the defendant and jury could all see the witness and analyze the defendant's demeanor, albeit over a television screen.[134] In *Romero*, however, "neither the defendant nor the trier of fact was fully able to 'look at [the witness], and judge by his demeanor upon the stand and the manner in which he [gave] his testimony whether he [was] worthy of belief.'"[135] This right to see the witness has many "subtle effects" on a criminal proceeding.[136]

In addition, the *Romero* court held the use of a disguise is similar to the use of a screen between the witnesses and the defendant in *Coy*.[137] The *Romero* court, however, went further to hold the use of the disguise

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127 *Id.* at 1121.

128 *Id.*

129 136 S.W.3d 680 (2004).

130 *Id.* at 690–91.

131 *Id.* at 682.

132 *Id.* The decision in *Romero* was decided just one month after the *Crawford* decision. *Id.* at 681; *Crawford,* 541 U.S. at 36. The *Crawford* decision was decided March 8, 2004, while the *Romero* decision was decided April 27, 2004. *Id.*; *Crawford,* 541 U.S. at 36. Whether the *Romero* court knew of or considered *Crawford* is unknown based on the appellate court decision.

133 *Romero*, 136 S.W.3d at 682–84.

134 *Id.* at 684 (citing *Craig*, 497 U.S. at 851).

135 *Id.* at 685 (quoting *Mattox*, 156 U.S. at 243).

136 *Id.* (quoting *Craig*, 497 U.S. at 851).

137 *Id.* at 682–83 (citing *Coy*, 487 U.S. at 1014).

was *worse* than the use of the screen in *Coy*.[138] The intent in *Coy* was to hide the defendant from the witness; in contrast, the intent in the case before the court in *Romero* was to hide the witness from the defendant.[139] This crucial dissimilarity did not allow the defendant to view the face of the witness and violated the defendant's confrontation rights.[140]

The *Romero* court noted that in *Craig*, a policy interest may prevail over face-to-face confrontation on an individual basis.[141] *Romero*, however, held even if a discussion of policy at the trial level in the *Romero* case had occurred, "we doubt that, under the circumstances, allowing an adult witness to substantially conceal his or her face while testifying in a criminal trial would pass constitutional muster."[142] History and precedent provide that the Confrontation Clause ensures the "literal right" to meet face-to-face and is a core value of the Confrontation Clause.[143] The court went even further to hold that the Second Circuit in *Morales*, "downplayed" this right when allowing the witness to wear sunglasses while testifying.[144] Although the witness may have had justifiable reasons for covering his face in *Romero*, "constitutional protections have costs."[145] Therefore, the disguise violated the defendant's constitutional right to confrontation.[146]

4. The Court of Appeals of Michigan in Sammons

The Court of Appeals of Michigan in *People v. Sammons*,[147] held unconstitutional the wearing of a full face mask while testifying under the Confrontation Clause.[148] The State's chief witness, an informant involved in the sale of cocaine with the defendant, wore a mask that covered his full face and head while testifying.[149] Not only did the witness wear the mask during the entrapment hearing,[150] but the witness also

138 *Id.* at 683.

139 *Id.* (citing *Coy*, 487 U.S. at 1020).

140 *Id.* at 690–91.

141 *Id.* at 684. (citing *Craig*, 497 U.S. at 855).

142 *Id.* at 687–88.

143 *Id.* at 688 (quoting *Green*, 399 U.S. at 157).

144 *Id.* (citing *Morales*, 291 F.3d at 62).

145 *Id.* at 689 (quoting *Coy*, 487 U.S. at 1020).

146 *Id.* at 691.

147 478 N.W.2d 901 (Mich. Ct. App. 1991).

148 *Id.* at 909.

149 *Id.* at 904.

150 *Id.* Although an entrapment hearing is not a criminal trial, the court in *Sammons* held, because an entrapment hearing is an adversarial process, and because there is a factual finding by the trier of fact, the defendant's protections under the Confrontation Clause apply to the entrapment hearing. *Id.* at 907.

refused to reveal his identity.[151] The trial judge allowed the witness to wear the disguise and also instructed the defense not to ask any "identifying questions" of the witness.[152] The purpose of allowing such protections of the witness was based on allegations that a codefendant offered cocaine to a third-party to have the witness killed. The defendant appealed on the grounds that he was unable to confront the accuser from behind a mask, and the mask prevented the trier of fact from assessing the witness's credibility.[153]

Considering both *Craig* and *Coy*,[154] the court in *Sammons* applied the *Craig* test, focusing on the State's interest in disguising and refusing to identify the witness, as well as the reliability of the witness's testimony.[155] First, the court in *Sammons* held the State did have an interest in the safety of the witness during a criminal proceeding; however, protective measures for the witness must be tailored to best "preserve the essence of effective confrontation . . . ."[156] In *Sammons*, the use of a mask "foreclosed the opportunity for the trier of fact to adequately assess the witness' credibility through observation of demeanor[,]" resulting in an ultimate failure to preserve this "essence" of confrontation.[157]

The ability to see the witness's face was deemed crucial in observing demeanor as "[t]he facial expressions of a witness may convey much more to the trier of facts than do . . . spoken words."[158] In addition, "a full-face mask tends to diminish the aspect of personalization associated with testifying about a defendant 'to his face.'"[159] The court in *Sammons*, therefore, held the mask "denied [the] defendant a critical aspect of his confrontation rights[]" because the defendant could not see his accuser's face and the trier of fact was precluded from assessing the witness's demeanor while testifying.[160]

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151 *Id.* at 904.

152 *Id.* at 905.

153 *Id.* at 905–06.

154 *Id.* at 908.

155 *Id.*

156 *Id.*

157 *Id.* at 909–10.

158 *Id.* at 909 (citing United States v. Walker, 772 F.2d 1172, 1179 (5th Cir. 1985).

159 *Id.* at 908.

160 *Id.* at 909. The *Sammons* court also held refusing to disclose the identity of the witness violated the Confrontation Clause. *Id.* By not identifying the witness, the defense was precluded from cross-examining the witness based on any background information, hindering the defense's ability to test the credibility of the witness. *Id.*

III. DISCUSSION: THE INTRODUCTION OF MANDATORY MASKS TO CRIMINAL PROCEEDINGS IN A GEORGIA COURTROOM

Individual courts and judges have begun recognizing and addressing potential Confrontation Clause violations resulting from changing court procedures in response to the coronavirus. Of particular concern has been the defendant's confrontation rights when witnesses wear masks while testifying during criminal trials. Although the novel coronavirus is only months old, the United States District Court for the Middle District of Georgia has already responded to concerns that witnesses testifying while wearing masks is unconstitutional.

In the United States District Court for the Middle District of Georgia in *United States v. Crittenden*,[161] Judge Land, at least preliminarily, held constitutional the requirement that witnesses wear face masks during criminal testimony in the coronavirus era.[162] The court in *Crittenden* considered the constitutionality of face masks in response to the Government's objection to the requirement that all witnesses wear face masks during Aubrey Crittenden's criminal trial.[163] The Government raised concerns "that by requiring witnesses to wear a mask that covers their nose and mouth during testimony, the Court may infringe upon the Defendant's right to face-to-face confrontation of the witnesses against him as guaranteed by the Confrontation Clause . . . ."[164]

Before responding to the constitutional question brought by the Government, the *Crittenden* court first addressed the evolution of the pandemic and the serious risks of spreading and contracting the coronavirus.[165] The court in *Crittenden* explained the coronavirus is believed to be spread through the respiratory tract—specifically through bodily fluids from coughing or sneezing.[166] The virus is also believed to stay on surfaces which, with subsequent contact with the respiratory tract— such as a person touching a surface and then his face or nose—

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161 United States v. Crittenden, No. 420-CR-7 (CDL), 2020 U.S. Dist. LEXIS 151950 (M.D. Ga. Aug. 21, 2020).

162 *Id.* at *26.

163 *Id.* at *1–*2.

164 *Id.* at *13. A Government motion arguing on behalf of the constitutional protections of the defendant is unusual. Although the Order and motion by the Government does not provide why the Government made the motion, it is most likely due to the fact the Government is concerned about potential reversals of judgments if masks at criminal trials are later deemed unconstitutional under the Confrontation Clause.

165 *Id.* at *2–*4.

166 *Id.* at *2.

could spread the virus.[167] If a person contracts the coronavirus, the individual may present with "respiratory distress, and it may cause death," especially amongst those with underlying health conditions.[168]

The spread of the virus creates a unique concern for the court: the health of all trial participants. Governments and businesses have been forced to adapt and adjust to prevent person-to-person contact, which is believed to be the reason the virus has spread so rapidly on a global level.[169] The *Crittenden* court stated, to prevent the spread of the coronavirus, "[i]ncreased vigilance" by the court is essential.[170]

The *Crittenden* court cited the "increased vigilance" of the United States District Court for the Middle District of Georgia courthouse, the location for the *Crittenden* trial.[171] The Middle District adopted a Standing Order,[172] which temporarily modifies courthouse procedures to adapt to the global pandemic.[173] The Standing Order allows the courthouse to remain open while excluding those who are or were exposed to the virus.[174] The Standing Order then goes further to extend all jury trials; the extension remains in effect as of the writing of this Comment in January 2021.[175] A later order out of the Middle District of Georgia adopted the President of the United States' Coronavirus Aid, Relief, and Economic Security Act (CARES Act),[176] giving each individual judge the discretion to create courtroom protocols to adapt to the needs of the courtroom and community.[177] Judge Land, presiding over the case of Aubrey Crittenden, created and enacted numerous restrictions for his courtroom, including that "[n]o one will be admitted to the courtroom

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167 *Id.*

168 *Id.*

169 *Id.* at *3.

170 *Id.*

171 *Id.*

172 Clay D. Land, *Standing Order*, IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, https://www.gamd.uscourts.gov/sites/gamd/files/general-ordes/Standing%20Order%202020-01%20re%20COVID-19%20Operations%20%28003%29.pdf (last visited Jan. 10, 2021).

173 *Id.*; *Crittenden*, 2020 U.S. Dist. LEXIS 151950, at *4.

174 *Id.*

175 *Crittenden*, 2020 U.S. Dist. LEXIS 151950, at *5; Marc T. Treadwell, *Standing Order Extending Jury Moratorium Because of National Emergency*, IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, https://www.gamd.uscourts.gov/sites/gamd/files/Standing_Order-2020-13_Jury_Moratorium.pdf (last visited Jan. 10, 2020).

176 H.R. 748 (March 27, 2020).

177 *Crittenden*, 2020 U.S. Dist. LEXIS 151950, at *9.

without wearing a mask, and the mask shall remain in place, including when speaking."[178]

After detailing the new courtroom and courthouse safety procedures, the court in *Crittenden* began discussing the specific requirement of masks in Judge Land's courtroom.[179] To decide whether witnesses wearing face masks during criminal trials violates the defendant's constitutional right to confrontation, the court first looked to Supreme Court precedent.[180] The court found that precedent affords the defendant the right to look at the witness face-to-face, but although this right to face-to-face confrontation is guaranteed, it is not absolute.[181] The *Crittenden* court then applied the *Craig* test[182] to determine the constitutionality of masks in criminal trials.[183] The court in *Crittenden* reiterated that, under the *Craig* test, physical, face-to-face confrontation can be denied: 1) in the furtherance of a necessary public policy; and 2) where the testimony is otherwise reliable.[184]

First, the court in *Crittenden* emphasized requiring witnesses to wear masks is a necessary public policy interest.[185] The requirement of masks "ensur[es] the safety of everyone in the courtroom in the midst of a unique global pandemic. Without this procedure, everyone in the courtroom would face the risk of being infected with a lethal virus."[186] The face masks are "necessary" because the Center for Disease Control and Prevention (CDC) determined that wearing a mask over the nose and mouth is "strongly recommend[ed]" to avoid infecting others with the coronavirus.[187] Furthermore, the CDC specifically found masks are more effective than the face shields and plexiglass screens the Government suggests be used instead of face masks.[188] To follow the "best available

178 *Id.* at *10. In addition, "[i]f a Defendant in a criminal proceeding, other than a trial, refuses to wear a mask, Judge Land will consider having the Defendant taken to the holding cell outside the courtroom and participate in the proceeding via video." *Id.* at *10–*11.

179 *Id.* at *10.

180 *Id.* at *13–*22.

181 *Id.* at *14 (citing *Coy*, 478 U.S. at 1020).

182 *Crittenden*, 2020 U.S. Dist. LEXIS 151950, at *16–*17. The court in *Crittenden* cited to *United States v. Yates* in which the court applied the *Craig* test in determining violations of confrontation rights. *Id.* at *15; 438 F.3d 1307 (11th Cir. 2006).

183 *Crittenden*, 2020 U.S. Dist. LEXIS 151950, at *17–*18.

184 *Id.* at *16–*17 (quoting *Craig*, 497 U.S. at 850).

185 *Id.* at *15.

186 *Id.*

187 *Id.* (citing *Considerations for Wearing Masks*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html (last visited Jan. 10, 2021)).

188 *Crittenden*, 2020 U.S. Dist. LEXIS 151950, at *16 (citing *Considerations for Wearing Masks*, CENTERS FOR DISEASE CONTROL AND PREVENTION,

science in this area" and to ensure the health and safety of all those attending or participating in the trial, the court in *Crittenden* determined the use of face masks is a necessary public policy interest under the *Craig* test.[189]

Next, under the *Craig* test, the *Crittenden* court considered the reliability of testimony when the witnesses wear face masks.[190] The court in *Crittenden* focused on the elements of reliability under the *Craig* test: having the physical presence of the witness, placing the witness under oath, cross-examining the witness, and allowing the trier of fact to observe the demeanor of the witness.[191] As held in *Craig*, even if one of the elements of reliability is interfered with, the other elements, if met, can preserve the reliability of the testimony.[192] Applying the reliability elements to the case in *Crittenden*, the court determined the defendant will still be able to place all witnesses under oath and cross-examine the witnesses.[193] The witnesses will still be physically present in the courtroom.[194] Although the witnesses will be wearing masks, the defendant and jurors will still be able to observe the demeanor of the witnesses, with the exception of observing the witnesses' noses and mouths.[195] The court in *Crittenden*, however, held the inability to see the witnesses' noses and mouths is not essential for reliability because "this restriction does not diminish the face-to-face nature of the confrontation contemplated by the Confrontation Clause.[196]

To explain its finding that face masks do not interfere with the nature of face-to-face confrontation, the *Crittenden* court took the opportunity to distinguish the facts presented before the court in *Crittenden* to the facts in *Coy* in which impeding the defendant's view of the witness via the placement of a large screen did violate the Confrontation Clause.[197] In *Coy*, a screen was placed between the defendant and the witness, almost completely obscuring any view of the witness.[198] When wearing a face

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https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html (last visited Jan. 10, 2021)). The Government specifically asked that masks be removed by witnesses during testimony, or transparent masks or plexiglass screens be utilized instead of face masks. *Id.* at *14–*15.

189 *Id.* at *16.

190 *Id.* at *17–*18.

191 *Id.* at *16 (citing *Craig*, 497 U.S. at 846).

192 *Id.* at *17 (citing *Craig*, 497 U.S. at 851).

193 *Id.* at *18.

194 *Id.*

195 *Id.*

196 *Id.*

197 *Id.* at *18–*19 (citing *Coy*, 478 U.S. at 1014).

198 *Id.* (citing *Coy*, 478 U.S. at 1014).

mask; however, the *Crittenden* court found there is only a "tiny piece of cloth covering" the nose and mouth of the witness; "the masks will in no way prohibit the Defendant and witnesses from directly looking upon each other in person . . . ."[199] Inevitably, the jury will not be able to observe movement of the nose and mouth; however, the *Crittenden* court concluded the right to confrontation does not include the ability of the jury to see "every language of the body."[200] Although not all facial expressions will be observable, there are other aspects of body language which allow for analysis of the witness's demeanor.[201] Rather:

> Demeanor includes the language of the entire body. Here, the jurors will be able to observe most facets of the witnesses' demeanor. They can observe the witnesses from head to toe. They will be able to see how the witnesses move when they answer a question; how the witnesses hesitate; how fast the witnesses speak. They will be able to see the witnesses blink or roll of their eyes, make furtive glances, and tilt their heads. The Confrontation Clause does not guarantee the right to see the witness's lips move or nose sniff . . . .[202]

The *Crittenden* court thereafter found requiring witnesses to wear face masks while testifying will be both reliable and necessary under public policy considerations.[203] The mask will not diminish face-to-face confrontation "in a material way."[204] Therefore, the court concluded the witnesses testifying while wearing masks does not infringe on Aubrey Crittenden's constitutional rights under the Confrontation Clause.[205]

IV. ANALYSIS

The United States was undoubtedly unprepared for the novel coronavirus, which wreaked havoc on every aspect of life in less than two months. In response to this wildly spreading virus, concern for health understandably and predictably led to federal and state requirements, such as limiting the size of gatherings, wearing masks in public places, diligent handwashing, and closing businesses and government agencies. It was impossible to predict, however, that the coronavirus's impact on the country would lead to serious constitutional questions.

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199 *Id.* at *19.
200 *Id.*
201 *Id.* at *20.
202 *Id.*
203 *Id.* at *22.
204 *Id.*
205 *Id.*

As the pandemic rages on, the country is beginning to reopen and adapt to the new-normal. Courts across the nation, in resuming criminal trials, are now faced with needing to both protect the health of its occupants as well as ensure any health measures do not offend defendants' constitutional rights. Although tempting to do in an unprecedented global pandemic, courts cannot forget that the Constitution is the very foundation of the United States, and even the health interests of its occupants cannot outweigh constitutional protections. This Analysis will show the court in *Crittenden* unconstitutionally permitted the requirement that witnesses testify while wearing face masks. Hiding the face of a testifying witness violates the Confrontation Clause, even in light of a global pandemic.

A. Supreme Court Precedent

Although a witness testifying behind a mask during a global pandemic has never been directly addressed by the Supreme Court, or even been at issue before the current year, precedent still leads to the answer that witnesses wearing masks while testifying during criminal trials violates the Confrontation Clause. The Supreme Court has consistently held a defendant has a constitutional right to confront the witnesses against him. Confusion, however, arises from the seemingly irreconcilable Supreme Court precedent on whether and when to dispense with or limit physical, face-to-face confrontation under the Confrontation Clause.

1. Whether Craig's Reliability Test Can Still Create Confrontation Clause Exceptions

Looking to the evolution of Supreme Court precedent regarding exceptions to the right to face-to-face confrontation, first, the *Coy* Court refused to create any exceptions to face-to-face confrontation.[206] The Court in *Coy* held, if an exception were to even exist, the exception must be based on the individual findings of that case and for some necessary public policy reason.[207] The *Craig* Court later established a test for creating exceptions to face-to-face confrontation upon finding the testimony is still reliable and upon finding there is a necessary public policy interest that outweighs face-to-face confrontation.[208] Although *Coy* and *Craig* can be reconciled, the *Crawford* Court recently held against judges creating discretionary exceptions to the right to face-to-face

206 *Coy*, 487 U.S. at 1021.

207 *Id.*

208 *Craig*, 497 U.S. at 850.

confrontation based on reliability.[209] The *Crawford* Court held that, for an exception to exist, courts must turn to the Framers' intentions, not to a judge's opinion or discretion.[210] Because the *Crawford* Court broadly denounced discretionary decisions by judges on the right to confrontation, particularly in the context of balancing reliability elements, how could *Craig's* reliability test possibly survive? The answer, although not explicitly expressed by the Supreme Court, is that the *Craig* test cannot survive post-*Crawford*.

Despite the *Crawford* decision, some courts continue to use the *Craig* reliability test to determine whether and when to dispense with face-to-face confrontation.[211] In fact, in *Crittenden*, the court relied on *Craig* and only mentioned *Crawford* in passing as an example of confrontation rights in the context of hearsay exceptions.[212] The confusion and lack of discussion of *Crawford* in addressing face-to-face confrontation questions are likely due to the fact that the question in *Crawford* focused on admission of out-of-court statements, while the *Craig* Court addressed the issue of confronting a witness during courtroom testimony in an untraditional way. However, there is no avoiding the Court in *Crawford* made sweeping holdings about the defendant's right to confrontation. The *Crawford* Court expressly held against discretionary decisions by judges under the Confrontation Clause and in no way limited its holding to hearsay testimony. Therefore, in considering potential violations to face-to-face confrontation, courts must turn to the *Crawford* Court's restrictive view to determine whether an exception exists under the Confrontation Clause.

Because the *Craig* test is inappropriate in finding Confrontation Clause exceptions, the court in *Crittenden* was incorrect in utilizing the *Craig* reliability test to determine whether the requirement that witnesses wear face masks while testifying is constitutional. The *Crawford* Court held the right to confrontation is not about reliability, and the Sixth Amendment does not provide for open-ended exceptions created by judges.[213] By allowing face masks that directly impair the ability to see the witness while testifying based on reliability, the court in *Crittenden* created the kind of exception the *Crawford* Court directly held against.

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209 *Crawford*, 541 U.S. at 54.

210 *Id.*

211 *See Jesus-Casteneda*, 705 F.3d at 1120.

212 *Crittenden*, 2020 U.S. Dist. LEXIS 151950, at *21.

213 *Crawford*, 541 U.S. at 54, 62.

2. Whether Judges Can Consider Public Policy

The holding in *Crawford* also raises questions about whether judges can limit a defendant's confrontation rights based on public policy post-*Crawford*. The *Crawford* Court clearly opposed judges making discretionary decisions about a defendant's confrontation rights but did so in the context of balancing reliability elements.[214] The Court in *Crawford* did not consider whether judges can use public policy to limit face-to-face confrontation. However, the *Crawford* Court's holding against judge-created exceptions to confrontation rights would suggest that *Crawford* also prohibits discretionary exceptions based on public policy. Nonetheless, this conclusion is not clear as the *Crawford* Court did not discuss public policy in its analysis or its holding.

If public policy considerations are permissible in limiting defendants' face-to-face confrontation rights, what is clear is that, for a court to restrict face-to-face confrontation based on public policy necessity, the court would have to do so on a case-by-case basis. The *Coy* Court rejected a generalized public policy argument based on presumed trauma.[215] The Court in *Craig* did hold in favor of a public policy argument but only upon very specific findings in the case before the Court.[216] This precedent makes clear for a court to limit the right to confrontation, the public policy consideration must be individually considered and decided based on the case before the court, not based on general presumptions or general concerns.

Therefore, findings based upon a general public policy concern, such as public health, is not sufficient to create an exception. The court in *Crittenden* improperly analyzed public policy considerations by generalizing concerns to every witness in the Aubrey Crittenden case. The *Crittenden* court should have made a case-by-case decision about whether the potential risk to each witness outweighs the defendant's right to see the witness's face. During a global pandemic, this public policy interest may often outweigh the defendant's right; however, precedent requires that this decision be made on an individual basis. In the case of a global pandemic, an individualized decision may require an inquiry into each witness's risk for contracting the coronavirus and an inquiry into each witness's overall health.

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214 *Id.* at 63.

215 *Coy*, 487 U.S. at 1021.

216 *Craig*, 497 U.S. at 857–58.

B. Why a Clear Rule Matters

Supreme Court precedent regarding a defendant's rights to face-to-face confrontation has been applied in various jurisdictions, both at the state and federal levels. Looking specifically to cases where witnesses partially or wholly hid their faces, a wide range of holdings resulted from these cases. The *Morales* court found *no* Supreme Court test was appropriate for determining if the disguise violated face-to-face confrontation,[217] while the other facial disguise courts focused on the *Craig* test.[218] The courts in *Morales* and *Jesus-Casteneda* found no violation of the Confrontation Clause, while the courts in *Romero* and *Sammons* did find a constitutional violation.[219] With the application of the *Craig* test in the majority of these cases, such variations are not surprising based on the wide discretion of the judges in these cases. Applying *Craig*, there is endless possibility for a court in its discretion to find numerous possible exceptions to face-to-face confrontation. With no set rule for what exceptions violate the Confrontation Clause, there is no predictable outcome for the defendant on his very constitutional rights.

Although there is no Supreme Court precedent that directly addresses witness face coverings, the applicable test should not be *Craig*. The test should be specific, predictable, and strict, so a defendant's confrontation right is not dispensed with based on the discretion of one individual. The right to confront witnesses would not be expressly included in the Constitution if the right was easily susceptible to the sway of judges. Therefore, courts for clarity and uniformity should follow the strict guidelines set by the *Crawford* Court to ensure a defendant's constitutional right to confrontation is not negligently or recklessly violated.

C. The Importance of a Witness's Entire Face and The Risk if The Full Face is Not Exposed

As has been reiterated throughout this Comment, there is a profound effect when the witness and defendant meet face-to-face in the courtroom. This meeting is so profound that the very language of the Confrontation Clause guarantees the defendant the right to a face-to-face meeting with his accuser.[220] This right is a literal, express, and explicit right. How can this right be fulfilled if the witness's face is half-hidden?

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217 *Morales*, 281 F.3d 58–59.

218 *See Jesus-Casteneda*, 705 F.3d at 1120; *Romero*, 136 S.W.3d at 685; *Sammons*, 478 N.W.2d at 908.

219 *Id.*

220 *Coy*, 487 U.S. at 1016.

The answer is clearly that partially or wholly hiding the witness's face simply cannot constitute face-to-face confrontation.[221] Face-to-face confrontation by its very language promises the defendant will see the witness's full face.

A witness against the defendant, if worthy of belief, can result in the defendant potentially losing his life or liberty. Such a high power requires the witness's face to be fully exposed. A facial covering simply does not allow the defendant and trier of fact to truly face the person accusing the defendant. The accuser is instead hidden. The *Crittenden* court downplayed the use of face masks by holding the ability to observe the nose and mouth of a witness is not crucial to observe a witness's demeanor. Yet, how can the witness's demeanor be observed with a mask hiding half of all facial expressions? The scrunch of the nose or the twist of the mouth can enlighten the trier of fact and the defendant to the authenticity of the testimony. The defendant's lawyer can react to a frown to continue with that line of cross-examination. With a mask, the witness has a way to hide those natural, reactionary facial expressions. To state the full facial expressions of the witness are not essential for face-to-face confrontation is both contradictory and unconstitutional.

If masks are permitted in the courtroom, defendants will inevitably have a more difficult time examining witnesses. If an accuser is dishonest, it will be easier for the witness to hide behind the mask. Although the argument can be made a witness can choose to lie with or without a mask, the Confrontation Clause is necessary because, even though it does not promise honest testimony, it does protect the defendant by providing him—and the trier of fact—the opportunity to assess the honesty of the witness. If all witnesses wear masks while testifying, the ultimate and terrifying result may be that it will become easier to convict a defendant purely based on an accuser's ability to testify behind the shadow of a mask. The humanity of a person is taken away when his face is hidden. Without full view of these facial expressions, it will become easier to just believe the words spoken and not register and observe that the witness is a person who may be lying.

Even during the age of technology, criminal trials have remained in-person, demonstrating the impact of physical, face-to-face confrontation. There is a profound effect of requiring the defendant, witnesses, prosecution, and trier of fact to come into one space, look upon each other, and play a part in the liberty of the defendant. If everyone can hide

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221 In *Romero*, the witness wearing sunglasses, a baseball hat, and a jacket prohibited the defendant and finder of fact from judging the demeanor of the witness. 136 S.W.3d at 682. In *Sammons*, the use of a full-face mask prevented an aspect of personalization that traditional face-to-face confrontation allows. 478 N.W.2d at 908.

behind their mask, it may just become easier to take a defendant's liberty away.

D. An Appropriate Remedy

To find unconstitutional witnesses wearing face masks while testifying does not eliminate all remedies and procedures a court can implement to protect those in the courtroom from contracting the coronavirus. The *Crittenden* court held face masks are the best protection against the coronavirus based on the current findings of the CDC.[222] Naturally, the safest method is often the best method. However, court adaptations cannot only focus on accommodating the health of everyone in the courtroom but must also protect the constitutional rights of the defendant.

Notably, on October 7, 2020, the vice-presidential candidates for the 2020 presidential election held a live debate *without* masks. The candidates were placed twelve feet apart and sat behind five-foot plexiglass screens.[223] Although never held-out to be as safe as face masks, to see that the use of plexiglass and twelve-foot distance is sufficient to have leaders of our country debate on the same stage without masks raises questions as to why it is not sufficient in the courtroom.

The courtroom could even provide protections beyond those at the debate. The witness could remove the mask while testifying but sit behind a plexiglass screen while the remainder of the courtroom wear masks. Determinations could be made before trial as to the risk to a witness, and the court could provide extra protections to the witness, such as providing the witness with a clear, transparent mask.[224] As tests become more available, witnesses could be tested before testifying,

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222 *See, How to Protect Yourself & Others*, CENTER FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (last visited Jan. 10, 2021).

223 Michael Scherer and Josh Dawsey, *Pence team agrees to plexiglass barrier on his side of debate stage*, THE WASHINGTON POST, https://www.washingtonpost.com/politics/vp-debate-coronavirus-safety/2020/10/06/ee44fa00-07e7-11eb-a166-dc429b380d10_story.html (last visited Jan, 10 2021).

224 The court in *Crittenden* mentioned the use of transparent masks but dismissed the Government's suggestion the court substitute cloth masks for plexiglass screens. 2020 U.S. Dist. LEXIS 151950, at *13. The court, however stated, "[n]othing in today's order prevents any witness or other participant from appearing with a mask that is transparent in the area of the mouth as long as it is consistent with CDC recommendations." *Id.* at n.1. With this footnote, the court seems to suggest that the use of transparent masks are sufficient. This may be the best solution for the court in *Crittenden* to protect the defendant's constitutional rights.

allowing them to remove their masks during testimony. Clearly, there are other possible procedures to protect the health of the courtroom as well as the constitutional rights of the defendant. If courts are still not confident with alternative procedures, the solution may be as simple as postponing the trial until face masks are no longer recommended by the CDC. However, no matter what decision is made or what procedure is selected, the coronavirus should not and cannot preclude constitutional rights.

V. CONCLUSION

In the wake of the coronavirus, courts are presented with the difficult task of ensuring the health of all occupants while maintaining defendants' constitutional protections. Changing procedures and enacting creative and uncommon measures to protect all individuals in the courtroom cannot be an easy task, and every court should be applauded for its efforts to reopen and provide for the community. However, as courts rapidly adapt to the coronavirus, the courts cannot overlook the Constitution. The text of the Constitution cannot be disregarded, even during unprecedented times and even when the requirements of the Constitution come at a high cost. Abiding by the Constitution often does come at a cost. The cost today is that courts cannot allow face masks during criminal trials, even during a global pandemic, without violating the Confrontation Clause.

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