

Mask-Wearing Prosecution Witnesses May Face Roadblocks

By **Scott Grubman**

The COVID-19 pandemic has caused significant havoc on every aspect of our daily lives. The legal system is no exception. For months now, the majority of court hearings, both criminal and civil, have been postponed or canceled altogether.

In Georgia, for example, on March 14, the chief justice of the Supreme Court issued an order declaring statewide judicial emergency, which has been extended three times since. That order has suspended all state jury trials until further notice. Other courts throughout the country have extended their jury trial moratoriums even further. The U.S. District Court for the Eastern District of Louisiana, for example, recently extended its trial moratorium until at least Oct. 5.



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Many courts have conducted hearings, where possible, via video or telephone. Even if such technology were logistically sufficient to hold jury trials, however, holding a criminal jury trial remotely would cause very serious concerns under the confrontation clause of the Sixth Amendment to the United States Constitution. Eventually, of course, courts will have to find ways to resume in-person criminal jury trials. Whenever that happens, courts are sure to face many unique challenges, logistically and legally.

For example, may a prosecution witness in a criminal trial, consistent with the Sixth Amendment's confrontation clause, be permitted to wear a mask while testifying? After all, as the U.S. Supreme Court held in *Coy v. Iowa*, the confrontation clause guarantees "a right to meet face to face all those who appear and give evidence at trial."^[1] And as the U.S. Court of Appeals for the Third Circuit noted in *Virgin Islands v. Aquino*:

Demeanor is of the utmost importance in the determination of the credibility of a witness. The innumerable telltale indications which fall from a witness during the course of his examination are often much more of an indication to judge or jury of his credibility and the reliability of his evidence than is the literal meaning of his words. Even beyond the precise words themselves lies the unexpressed indication of his alignment with one side or the other in the trial.^[2]

The answer, perhaps not surprisingly, is unclear. The two seminal cases on the subject are *Coy v. Iowa* and *Maryland v. Craig*.^[3]

In *Coy*, the defendant was charged with sexually assaulting two minors. At his jury trial, the court granted the state's motion to place a screen between the defendant and the victims while they testified, "which blocked him from their sight but allowed him to see them dimly and to hear them." The defendant argued that this violated his right under the confrontation clause, and the Supreme Court agreed.

In a 6-3 decision authored by Justice Antonin Scalia, the court held that the defendant's right to "face-to-face confrontation was violated, since the screen at issue enabled the complaining witnesses to avoid viewing [him] as they gave their testimony." The court rejected the state's argument that the potential trauma to sexual abuse victims having to look at their attacker outweighed the defendant's rights under the confrontation clause.

The court said it would "leave for another day" whether any exceptions to the confrontation clause existed, but held that "[w]hatever they may be, they would surely be allowed only when necessary to further an important public policy."

Two years later, in *Maryland v. Craig*, another child sex case, the Supreme Court reviewed a trial court's decision to permit a minor alleged sexual assault victim to testify via one-way closed-circuit television, after the state presented expert testimony that requiring the victim to testify in the courtroom could result in "serious emotional distress." In a 5-4 opinion written by Justice Sandra Day O'Connor, the court noted that it had never held that the confrontation clause guaranteed criminal defendants "the absolute right to a face-to-face meeting with witnesses against them at trial."

The court held that there were four elements of "confrontation" that serve the purpose of the confrontation clause — physical presence, oath, cross-examination and observation of demeanor by the trier of fact. According to the court, while face-to-face confrontation forms "the core of the values furthered by the Confrontation Clause ... it is not the sine qua non of the confrontation right."

The court went on to hold that although the confrontation clause reflects a "preference for face-to-face confrontation at trial," it is not indispensable. In conclusion, the court in *Craig* held that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."

The Supreme Court's decisions in *Coy* and *Craig* have caused courts around the country to struggle with whether prosecution witnesses can testify while having their face obscured.

Sunglasses

Various courts have approved of prosecution witnesses wearing dark sunglasses while testifying. For example, the U.S. Court of Appeals for the Second Circuit in *Morales v. Artuz* upheld the trial court's decision to permit an adult witness in a murder case, who feared the defendant, to testify in dark sunglasses.[4] The court in *Morales* cited "empirical data" questioning whether demeanor is truly a useful basis for assessing credibility.

The California Court of Appeals for the Fourth District in *People v. Brandon* also upheld a trial court's decision to allow a prosecution witness to wear dark sunglasses (along with a scarf covering the witness's head) because the jury was still able to hear her testimony "while observing her facial expressions and body language to a degree that no constitutional violation occurred." [5]

Similarly, in *Commonwealth v. Lynch*, the Massachusetts Supreme Court held that a witness wearing dark sunglasses did not violate the confrontation clause because "'[f]ace to face' confrontation does not mean 'eye to eye' and wearing dark glasses does not prevent exposure of a witness's face." [6]

Wigs and Facial Disguises

Courts have been less consistent when it comes to types of facial disguises. Consistent with *Craig*, courts tend to focus on two factors: How much of the witness's face is covered by the disguise, and whether there is a legitimate reason for the witness to wear a disguise.

For example, in *United States v. Nasser*, the U.S. District Court for the Eastern District of New York granted a prosecution motion to permit six undercover intelligence officers to testify at trial using personal identification numbers rather than names and wearing disguises in the form of wigs and light makeup.[7] Important to the court's analysis in *Nasser* was that the disguise would not be applied in a way that would impair the defendant's or jury's ability "to view the witnesses' full facial expressions." In light of the government's interest in protecting the officers' identities, the court concluded that "any limitation these disguises may impose on the defendant's confrontation right is justified." [8]

In *Romero v. State*, however, a Texas Court of Appeals held that permitting a key state witness to wear a disguise that hid "almost all" of his face violated the confrontation clause, particularly in light of the fact that the witness acknowledged that, although he feared for his own safety, he had never actually been threatened by the defendant.[9]

Head or Face Scarfs

At least two courts have been asked to decide whether permitting a prosecution witness to testify while wearing a head or face scarf for religious purposes violated the defendant's rights under the confrontation clause.

In *Commonwealth v. Smarr*, the Pennsylvania Superior Court held that permitting a witness to testify while wearing a scarf over part of her face because of religious beliefs did not violate the defendant's constitutional rights.[10]

The court in *Smarr* concluded that the defendant had not established that he was denied "a physical, face-to-face confrontation" with the witness, but that even if he had established such a denial, the trial court's decision would still be affirmed under the Supreme Court's test in *Craig* because permitting the witness to wear the scarf was necessary to further the "important public policy" of protecting the witness's ability to exercise her religious rights. The court also held that the second prong of the *Craig* test — that the reliability of the witness's testimony was otherwise assured — was also satisfied because the trial court found that the jury was "amply able to observe [the witness's] demeanor."

In *People v. Kitchens*, a California Court of Appeals also addressed the issue as to whether permitting a prosecution witness to testify while wearing a religious headscarf was permissible under the confrontation clause.[11]

The witness testified for two days. On the first day of testimony, the witness's scarf "covered her entire face" except for one of her eyes and a portion of her nose. Prior to the second day of testimony, the trial court described the witness's scarf as being "'tight against her face,' which allowed the jurors, defendants, and counsel to 'see clearly the outline of her face and her lips when she talks,' and to 'see her facial expressions even through the head scarf.'" And the witness eventually agreed to pull down her mask so that both eyes and her nose were exposed, "thereby rendering the coverage no greater than that of a man's full beard."

The court in *Kitchens* concluded that the manner in which the witness wore her scarf on the second day of her testimony did not infringe upon the defendant's constitutional rights. As for the manner in which she wore her scarf on her first day of testimony, the court viewed that as presenting "a more difficult issue," but concluded that while this was more likely to cause a constitutional concern, they did not have to reach an ultimate conclusion because any error in permitting the witness to wear her mask was harmless in light of the other evidence presented at trial.

Face Masks

Courts have not been consistent in deciding whether a prosecution witness may testify while wearing a face mask.

For example, in *People v. Sammons*, the Michigan Court of Appeals held that permitting the prosecution's chief witness to testify at an entrapment hearing while wearing a mask that covered "both his face and head" violated the defendant's rights under the confrontation clause.[12] The court in *Sammons* held that "a full-face mask tends to diminish the aspect of personalization associated with testifying about a defendant 'to his face'" and that this "may very well make a witness 'feel quite differently' than when he has to repeat his story while looking at the defendant."

But, in *State v. Walker*, the New Hampshire Supreme Court upheld the trial court's decision to permit an undercover narcotics officer to testify wearing a balaclava "which covered most of the witness's mouth but allowed the jury to see most of his face." [13]

So What About Masks in Light of COVID-19?

There are no known cases, so far, addressing the question of whether a prosecution witness may wear a mask in light of the COVID-19 pandemic. A court addressing this question would almost certainly cite the Supreme Court's test from *Craig* and analyze (1) whether permitting the witness to wear a mask is necessary to further an "important public policy"; and (2) whether the reliability of the testimony is otherwise assured.

The first question related to public policy would likely be an easy "yes" in light of the nearly universal sentiment by public health experts regarding the necessity of wearing masks to protect against the spread of COVID-19.[14]

The second question — whether the reliability of the witness's testimony is otherwise assured — would require a more fact-intensive, case-by-case analysis. Based on the cases cited above, courts will likely consider various factors, including how much of the witness's face is covered by the mask.

A mask like an N95 mask that covers only the mouth and nose and nothing more might be more acceptable than a larger cloth mask that covers all but the witness's eyes. Courts might also consider how vital the witness's testimony is to the prosecution's case. Allowing a key prosecution witness such as the one in *Romero v. State* to wear a face mask might cause more significant issues than permitting a mere records custodian to do so.

Conclusion

While it is impossible to determine what the future impact of the COVID-19 pandemic on the legal world will be, it is unquestionable that, at some point, courts will have to resume criminal jury trials, and it is highly likely that when they do, at least some witnesses will insist on wearing masks to protect themselves and others against the virus. This will almost certainly lead to a new line of court cases weighing that public health need against a defendant's Sixth Amendment right to confront prosecution witnesses.

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[1] 486 U.S. 1012, 1021 (1988).

[2] Virgin Islands v. Aquino, 378 F.2d 540, 548 (3d Cir. 1967). See also U.S. v. Walker, 772 F.2d 1172, 1179 (5th Cir. 1985) ("The facial expressions of a witness may convey much more to the trier of facts than do spoken words.").

[3] 497 U.S. 836 (1990).

[4] 281 F.3d 55, 62 (2d Cir. 2002).

[5] 52 Cal. Rptr. 3d 427, 445 (2006).

[6] 789 N.E.2d 1052, 1060 (Mass. 2003). Although not a sunglasses case, in United States v. Kaufman, the Tenth Circuit questioned the constitutionality of the district court's "no eye contact" order preventing the defendant from making eye contact with certain witnesses, but held that any error was harmless. 546 F.3d 1242, 1256-57 (10th Cir. 2008).

[7] No. 10-CR-19, 2015 WL 13843166, at *4 (E.D.N.Y. Jan. 26, 2015).

[8] See also U.S. v. de Jesus-Casteneda, 705 F.3d 1117, 1120-21 (9th Cir. 2013) (approving of witness wearing wig and mustache); Smith v. Graham, No. 10-CV-3450, 2012 WL 2428913, at *8 (S.D.N.Y. May 7, 2012) (approving of witness testifying with false name while wearing wig and false beard and mustache); People v. Smith, 869 N.Y.S.2d 88, 90 (N.Y. App. 2008) (upholding trial court's decision to permit state witness to testify using pseudonym while wearing wig and false facial hair).

[9] 136 S.W.3d 680, 682-89 (Tx. Ct. App. 2004), aff'd 173 S.W.3d 502 (Tex. Crim. App. 2005).

[10] No. 1179 WDGA 2018, 2019 WL 2881487, at *7 (Penn. Super. July 3, 2019).

[11] No. B282486, 2019 WL 2404393, at *4-*8 (Cal. App. June 7, 2019).

[12] 478 N.W.2d 901, 909 (Mich. App. 1991).

[13] No. 2009-0606, 2011 WL 13092652, at *1 (N.H. March 21, 2011). In two other cases, the New Hampshire Supreme Court declined to decide whether permitting a testifying police officer to wear a full ski mask violated the defendant's rights under the Confrontation Clause, concluding that any such violation would be harmless. State v. Hernandez, 986 A.2d 480, 485-86 (N.H. 2009) and State v. Karuru, No. 2009-0324, 2010 WL 11437214, at *2 (N.H. June 22, 2010).

[14] See, e.g. <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html>.

