

# THE CONSTITUTIONALITY OF REMOTE TRIALS

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## I. INTRODUCTION

analyses. They were  
enjoy the same hard-  
emphasized the importance of a unanimous verdict for a criminal proceeding  
when delivering his opinion in *Ramos v. Louisiana*.<sup>2</sup> Though the case dealt  
implied within the Sixth Amendment,<sup>3</sup>  
apply to a dilemma that many states are facing today: the constitutionality of  
conducting remote trials.<sup>4</sup> Due to COVID-19 and the pandemic, many trials  
have either been delayed or conducted remotely.<sup>5</sup> Parties have argued that  
the inability to cross-examine a witness face-to-face was a violation of their  
Confrontation Clause rights as written in the Sixth Amendment. Courts that  
policy interest to protect people from contracting the COVID-19 virus by not  
appearing in court. But the pervasive question is whether the Confrontation

-benefit

<sup>1</sup> Justice Gorsuch

due to its vagueness. Part IV further considers how the pandemic complicated face-to-face confrontation from a public policy perspective. In Part V, this Essay argues that there are important reasons to safeguard an onfronation right that outweigh public policy concerns about the

Confrontation rights during COVID-19. Finally, Part VI concludes that this issue may be one that the Supreme Court must hear.

## II. BACKGROUND INFORMATION

As the world struggled to comply with the new Center for Disease Control and Prevention (CDC) standards due to COVID-19, the courts in the United States faced a challenge: could courts operate remotely? Trials were delayed, speedy trial issues arose, and other procedural issues grew due to the pandemic.<sup>6</sup> Some states began to conduct remote trials over Zoom and other platforms.<sup>7</sup> The Sixth Amendment of the United States Constitution clearly states the Confrontation ri

accused shall enjoy the right . . . to be confronted with the witnesses against

<sup>8</sup> Yet some courts have found it to be a vague provision that calls for interpretation. Thus, the Confrontation Clause has become a topic of debate

rather than in person.

Prior to discussing why remote trials are a violation of the Confrontation Clause, it is important initially to discuss the breakthrough of cases that altered or recharacterized the limitations of the Confrontation Clause. The first case came in 1895, in *Mattox v. United States*, where the Supreme Court

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ntroduced into

evidence because both witnesses were unavailable for cross-examination.<sup>10</sup>

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6. See *Courts Suspending Jury Trials as COVID-19 Cases Surge*, U.S. CTS. (Nov. 20, 2020), <https://www.uscourts.gov/news/2020/11/20/courts-suspending-jury-trials-covid-19-cases-surge>.

7. Rattey, *supra* note 4, at 2; Matt Reynolds, *Going Virtual: Courts Attempt to Balance Innovation with Access in Remote Proceedings*, 107 A.B.A. J., at 44, 44, 47 (2021).

8. U.S. CONST. amend. VI.

9. Jeffrey Bellin & Diana Bibb, *The Modest Impact of the Modern Confrontation Clause*, TENN. L. REV. (forthcoming 2021) (manuscript at 8) (<https://ssrn.com/abstract=3816667>) (referencing *Mattox v. United States*, 156 U.S. 237, 243-44 (1895)).

10. *Mattox*, 156 U.S. at 240-44. In *Mattox*, during the initial court hearing, both witnesses were available and cross-examined. *Id.* at 240. However, after appeal, both witnesses had died and thus were not available to be cross-examined. *Id.* Defendant objected to the introduction of both

even though the witness was not available for cross-examination.<sup>11</sup> This particular case introduced the principle that the Confrontation Clause does

that were made in court, under oath, and already subject to cross-examination.<sup>12</sup>

In 1980, the Court decided *Ohio v. Roberts*, where Justice Blackmun delivered an opinion that loosened the restrictions for allowing out-of-court statements to

distress.<sup>19</sup> The Court reasoned that a one-way closed-circuit television

<sup>20</sup>

interest was to protect a child who had been traumatized from alleged sexual abuse from incurring further trauma by testifying in front of the alleged sexual abuser.<sup>21</sup> Thus, if an alleged victim could not participate in face-to-face confrontation, it had to be case-specific<sup>22</sup> and further an important public policy interest.<sup>23</sup> In *Craig*, protecting an alleged child victim from incurring further trauma to the point of being unable to testify was case-specific, and the court found it to be a compelling one that furthered a public policy.<sup>24</sup>

As face-to-face confrontation in court was being challenged, the reasonable test as outlined in *Roberts* was in the process of being challenged as well in *Crawford v. Washington*.<sup>25</sup> In 2004, Michael Crawford was on trial for assault and attempted murder for stabbing a man who allegedly tried to rape his wife.<sup>26</sup> During the trial, the state sought to introduce a recorded

<sup>27</sup> However, the

wife, due to martial privilege, did not testify in court and thus was not available for cross-examination.<sup>28</sup> Therefore, after being charged with assault, the defendant argued that the state violated the Confrontation Clause

and the Court agreed.<sup>29</sup> The

Court reasoned that the reliability test was not only a subjective concept that

testimonial statements into evidence that the Confrontation Clause explicitly meant to exclude.<sup>30</sup>

testimony. The Court rejected the reliability test and adopted a new concept

accused

<sup>31</sup> Such testimonial

statements include statements made under such a circumstance that would

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19. *Id.* at 840-42.

20. *Id.* at 852, 857.

21. *Id.* at 842, 852-53.

22. *Id.* at 855-58.

23. *Id.* at 844-45, 848-50 (citing *Coy v. Iowa*, 487 U.S. 1012, 1021-23 (1988) and *Mattox v. United States*, 156 U.S. 237, 240-44 (1895)).

24. *Id.* at 852-57.

25. 541 U.S. 36 (2004).

26. *Id.* at 38, 40.

27. *Id.*

28. *Id.*

29. *Id.* at 40, 68-69.

30. *Id.* at 63.

31. *Id.* at 51 (citation omitted).

<sup>32</sup> In addition, the Confrontation Clause commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-<sup>33</sup> Thus,

ability to cross-examine  
rights.<sup>34</sup>

### III. CONSTRUCTION ZONE

The Constitution clearly outlines certain provisions within the Sixth Amendment such as a speedy trial with an impartial jury or a right to confront a witness.<sup>35</sup> However, a face-to-face confrontation or a unanimous jury



## V. IMPORTANT REASONS FOR FACE-TO-FACE CONFRONTATION

In-person trials are demanded by the Confrontation Clause as they allow for face-to-face confrontations, which is the traditional way criminal trials are conducted. The importance of face-to-face confrontation is declared in *Mattox*:

The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.<sup>48</sup>

One of the key aspects of trial is the ability to examine and cross-examine a witness who will be testifying in court. During the process, it is for the jury to decide whether during examination such a witness is a credible one.<sup>49</sup> The physical presence in a courtroom will cause the witnesses to appreciate the gravity of the proceedings, as the defendant will be able to cross-examine the witness, and the jurors will have the full opportunity to evaluate the credibility of the witness.<sup>50</sup> In addition, physical cues such as

Confrontation rights.<sup>52</sup> The Court found the trauma the child would suffer while testifying in front of the accused to be an important state public policy interest.<sup>53</sup> However, when it has come to the risk of COVID-19, courts have *Craig*, was satisfied.<sup>54</sup>

Moreover, *Craig* *Crawford*  
redefinition of the tests for the Confrontation Clause.

In *United States v. Casher*, two witnesses who were served a subpoena to travel to court during the pandemic were denied a motion to quash their subpoenas because the subpoenas were neither unreasonable nor oppressive.<sup>55</sup> The court stated the risk for COVID-19 was neither imminent nor so substantial for it to be considered oppressive.<sup>56</sup> The witness said that though he did not have any health issues, he did not feel comfortable navigating a major airport.<sup>57</sup> The court concluded the witness was not currently hospitalized for any medical issues or considered to be terminally ill<sup>58</sup> and was able to take alternative precautionary measures, like driving, in order to reach court.<sup>59</sup> Thus, none of the reasons the witness argued for presented a necessity that would further a public interest in order to forego

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In *United States v. Pangelinan*, the District Court of Kansas debated Confrontation rights.<sup>61</sup> The court reasoned that the state did not show testifying remotely was necessary to further an important public policy interest because neither of the witnesses had contracted the virus and did not have serious health issues that made their physical travel to the court impossible.<sup>62</sup> In this specific case, though the witnesses had some health concerns, they did not have any medical conditions that would place them in

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52. *Maryland v. Craig*, 497 U.S. 836, 844-49, 852-57 (1990).

53. *Id.* at 852-53.

54. Brief of Amici Curiae, *supra* note 51, at 12-13.

55. *United States v. Casher*, No. CR19-65-BLG, 2020 WL 3270541, at \*1-2 (D. Mont. June 17, 2020).

56. *Id.* at \*2.

57. *Id.* at \*3.

58. *Cf. United States v. Donziger*, No. 19-



a high-risk category if they contracted the COVID-19 virus.<sup>63</sup> In addition, the court then contrasted cases in which witnesses were considered to be at high risk, such as in *United States v. Gigante* where the witness was permitted to appear remotely because his doctor considered it unsafe to travel due to him being terminally ill.<sup>64</sup> Likewise, the court in *United States v. Sapse* allowed the witnesses to appear through video testimony because the witnesses were severely disabled to the point of not being able to use their legs, were in the care of permanent caregivers, and could not perform the most basic functions without assistance.<sup>65</sup> Thus, the case of necessity to further a public policy interest sufficient to overcome Confrontation rights is a high threshold to reach. Not feeling comfortable navigating an airport or not having any medical conditions that would place the witness in a high-risk category are not considered to be necessary to further an important public policy. In addition, such reasons do not outweigh a graver public interest that is at stake in a criminal proceeding: the right to an in-person trial before possible incarceration.

#### VI. CONCLUSION

The issue of the supremacy of the Confrontation Clause is not easily g0 G[uq,5 q0.00000912 0 612