

# THE CONSTITUTIONALITY OF REMOTE TRIALS

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Norman M. Garland\*

## I. INTRODUCTION

“When the American people chose to enshrine that right in the Constitution, they weren’t suggesting fruitful topics for future cost-benefit analyses. They were seeking to ensure that their children’s children would enjoy the same hard-won liberty they enjoyed.”<sup>1</sup> Justice Gorsuch 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 with Louisiana’s criminal courts adhering to a unanimous jury verdict as implied within the Sixth Amendment,<sup>3</sup> Justice Gorsuch’s reasoning could 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 have conducted remote trials have reasoned that it is in the states’ public policy interest to protect people from contracting the COVID-19 virus by not appearing in court. But the pervasive question is whether the Confrontation Clause can yield to such a public policy interest.

In Part II, this Essay discusses important precedent on the Confrontation Clause and explains what situations violate it. Next, Part III describes how some language in the Sixth Amendment can be interpreted in varying ways

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1. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1402 (2020).
2. *Ramos*, 140 S. Ct. 1390.
3. *Id.* at 1394.
4. Justin D. Rattey, *Gap Filling: Assessing the Constitutionality of Virtual Criminal Trials in Light of Ramos v. Louisiana*, 125 PENN ST. L. REV. PENN STATIM 1, 1-2 (2020).
5. *Id.* at 2.

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 accused's Confrontation right that outweigh public policy concerns about the pandemic. It also includes recent court opinions regarding defendants' 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 right: “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”<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 yet again as the right to “confront” a witness is being done over a computer 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 proclaimed that the “[C]onfrontation right bars some, but not all, out-of-court statements.”<sup>9</sup> There, the Court rejected the defendant's Confrontation Clause argument that a witness's court testimony could not be introduced 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 witnesses' transcripts to be admitted during the appeal hearing because of the witnesses' unavailability to be cross-examined. *Id.*

The Court found that admitting the deceased witness's transcript into evidence was not a violation of the defendant's Confrontation Clause rights even though the witness was not available for cross-examination.<sup>11</sup> This particular case introduced the principle that the Confrontation Clause does not prohibit all testimony, especially a deceased witness's prior statements 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 be admitted without violating the Confrontation Clause.<sup>13</sup> There, the Court stated "reliability" was the key factor in deciding whether such statements could be admitted into evidence over a Confrontation Clause objection.

In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.<sup>14</sup>

In other words, an out-of-court statement that satisfied a traditional hearsay exception could be admitted against the accused even if the declarant were unavailable to testify.<sup>15</sup> Thus, the inability to confront a witness, who was not deceased, was no longer a viable reason for the Court to find a violation of the Confrontation Clause.

The Confrontation Clause's "face-to-face" confrontation was further tested in 1990 in *Maryland v. Craig*.<sup>16</sup> There, the Court argued that though face-to-face does form the "core of the Clause's values, it is not an indispensable element of the confrontation right."<sup>17</sup> In addition, the Court in *Craig* argued "public policy" to be a major reason as to why the witness need not testify face-to-face with the abuser in the same courtroom.<sup>18</sup> In *Craig*, a child victim had been sexually abused and was unable to testify in front of the abuser without the testimony causing the victim severe emotional

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11. *Id.* at 243-44.

12. *Id.*; see also Barbara Rook Snyder, *Defining the Contours of Unavailability and Reliability for the Confrontation Clause*, 22 CAP. U. L. REV. 189, 189, 193 n.34 (1993).

13. See 448 U.S. 56, 62-66 (1980).

14. *Id.* at 66 (citation omitted).

15. See Bellin & Bibb, *supra* note 9 (manuscript at 8-9).

16. 497 U.S. 836 (1990).

17. *Id.* at 837, 847-50.

18. *Id.* at 849-50, 853.

distress.<sup>19</sup> The Court reasoned that a one-way closed-circuit television procedure was necessary in this case to further a “state interest.”<sup>20</sup> The state’s 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 statement that the petitioner’s wife made while in custody.<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 by introducing his wife’s statements at trial and the Court agreed.<sup>29</sup> The Court reasoned that the reliability test was not only a subjective concept that depended heavily on a judge’s discretion, but also a test that allowed testimonial statements into evidence that the Confrontation Clause explicitly meant to exclude.<sup>30</sup> An example of such a statement was the wife’s recorded testimony. The Court rejected the reliability test and adopted a new concept stating, “the Confrontation Clause . . . applies to ‘witnesses’ against the accused—in other words, those who ‘bear testimony.’”<sup>31</sup> Such testimonial statements include statements made under such a circumstance that would “lead an objective witness reasonably to believe that the statement would be

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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).

available for use at a later trial.”<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-examination.”<sup>33</sup> Thus, the wife’s statement admitted into evidence without the defendant having the ability to cross-examine the witness violated the defendant’s Confrontation 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 verdict conviction are not clearly outlined within the Sixth Amendment. Thus, due to the Constitution being silent on such matters, certain scholars such as Justin D. Rattey, author of *Gap Filling: Assessing The Constitutionality of Virtual Criminal Trials In Light of Ramos v. Louisiana*, have called these areas to be within the “Construction Zone”<sup>36</sup> and are up for interpretation.<sup>37</sup> The much-heated debate in *Ramos* focused on the vague or omitted<sup>38</sup> language of the Sixth Amendment to determine whether Louisiana’s long-held state law of a nonunanimous jury verdict conviction was constitutional according to the Sixth Amendment.<sup>39</sup>

Prior to *Ramos*, Louisiana had allowed non-unanimous jury verdict convictions.<sup>40</sup> Justice Gorsuch, who delivered the opinion for the Court, struck down the long-held law of nonunanimous jury verdict convictions and held unanimous jury verdict convictions to be the law in both state and

32. *Id.* at 51-52.

33. *Id.* at 61.

34. *Id.* at 68.

35. U.S. CONST. amend. VI.

36. Rattey, *supra* note 4, at 3. Construction Zone is defined as, “that area within which the ‘constitutional text does not provide determinate answers.’ The zone exists because of the inherent vagueness of language and ambiguity of constitutional provisions, as well as because of gaps and contradictions in the Constitution as a whole.” *Id.* at 4 (footnote omitted) (quoting Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 458 (2013)).

37. *See id.* at 3; *see also* Christopher Robertson & Michael Shammass, *The Jury Trial Reinvented*, *TEX. A&M L. REV.* (forthcoming 2021) (manuscript at 77) ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3796292](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3796292)).

38. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1400 (2020). James Madison’s proposal for the Sixth Amendment originally included “the requisite of unanimity for conviction.” *Id.* However, the Senate omitted such language and thus the Court in *Ramos* analyzed such omission by the Senate to mean either that the language was redundant and surplusage or there was an intent to abandon the traditional unanimity requirement. *Id.* at 1400-01.

39. *Id.* at 1394-95.

40. *Id.* at 1394.

federal criminal courts.<sup>41</sup> The Court reasoned that though the Sixth Amendment does not specifically require a unanimous jury verdict, it had been a common practice for over 400 years.<sup>42</sup> In addition, Louisiana court systems should adhere to years of precedent by accepting such provision with humility instead of trying to reassess whether a unanimous jury is an important right to attain.<sup>43</sup> Thus, *Ramos* brought an end to non-unanimous jury verdict convictions under the Sixth Amendment.

#### IV. PUBLIC POLICY: CONTRACTING CORONAVIRUS OR CONFRONTATION CLAUSE

The Court in *Ramos* analyzed the constitutionality of unanimous jury verdicts by looking at history and examining the original text of the Constitution.<sup>44</sup> This form of analysis is also applicable to analyzing whether conducting remote trials is constitutional as opposed to cross-examining witnesses face-to-face under the Confrontation Clause.

It has been a long-held practice for trials to be conducted in person. However, due to the fact that the coronavirus can be easily transmitted, some courts have turned to remote trials to prevent further delayed trials.<sup>45</sup> Several courts have reasoned that public policy is a leading factor in conducting remote trials as it would further a state's interest in preventing the coronavirus from spreading.<sup>46</sup> Although the importance of protecting the public from contracting the virus is of significant interest, the question remains whether such public policy can trump the Confrontation Clause rights of an accused. "[B]ecause a criminal defendant risks incarceration, the United States Constitution affords greater protections, including the defendant's right 'to be confronted with the witnesses against him.'"<sup>47</sup> Thus, even though protecting the public from contracting the coronavirus is a significant public policy concern, overriding an accused's right to conduct a trial is mandated by the Confrontation Clause.

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41. *Id.* at 1397.

42. *Id.* at 1396.

43. *Id.* at 1402.

44. *Id.* at 1395-1400.

45. Rattey, *supra* note 4, at 2; Reynolds, *supra* note 7, at 44, 47; see also Jane Shvets & Kate Witteman, *The Criminal Trial and COVID-19: Continuing Challenges as Courts Begin to Open Up*, 21 CRIM. LITIG. 20, 20-21 (2021), <https://www.americanbar.org/groups/litigation/committees/criminal/practice/2021/criminal-trial-and-covid-19-continuing-challenges-as-courts-begin-to-open-up/>.

46. See, e.g., Vazquez Diaz v. Commonwealth, 167 N.E.3d 822, 837-38 (Mass. 2021).

47. United States v. Casher, No. CR19-65-BLG, 2020 WL 3270541, at \*2 (D. Mont. June 17, 2020) (quoting U.S. CONST. amend. VI).

## 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 the twitching of the foot, fidgeting of the hands, and the ability to see a witness's face when answering a question, are not visible through remote trials.<sup>51</sup> If certain non-verbal characteristics are not visible in trial, it can lead to an unfavorable outcome that could have differed had the trial been in person rather than conducted remotely. Thus, if remote trials rather than in-person trials can result in an unjustifiable outcome unfavorable to the accused, the supremacy of the Confrontation right must be recognized.

Certain exceptions that further an important public policy interest excuse face-to-face confrontation, as outlined in *Craig*, where a child witness was able to testify via closed-circuit TV without violating the accused's

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48. *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

49. See Akua F. Abu, *Remote Justice: Confronting the Use of Video Teleconference Testimony in Massachusetts Criminal Trials*, 34 HARV. J. L. & TECH. 307, 315-16, 326 (2020) (noting that credibility of a witness can be observed by the jurors as they view the physical demeanor of a witness while they are on the stand in order to make a personal observation of whether or not the witness is credible).

50. Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond*, 115 NW. U. L. REV. 1875, 1902 (2021).

51. See Brief for S. Paige Canfield et al. as Amici Curiae Supporting Appellant at 22-24, *Smith v. State of Missouri*, No. SC99086 (May 25, 2021) [hereinafter Brief of Amici Curiae].

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 debated whether a “practical necessity,” as termed in *Craig*, was satisfied.<sup>54</sup> Moreover, *Craig* was decided prior to the Court’s adoption of the *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 the defendant’s Confrontation rights.<sup>60</sup>

In *United States v. Pangelinan*, the District Court of Kansas debated whether three witnesses testifying remotely would violate the defendant’s 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-CR-561, No. 11-CV-691, 2020 WL 8465435, at \*1-2 (S.D.N.Y. Oct. 23, 2020) (allowing witness to testify remotely rather than in person because the witness was at heightened risk due to serious health complications if contracted the COVID-19 virus).

59. *Casher*, 2020 WL 3270541, at \*3.

60. *Id.* at \*3-4.

61. *United States v. Pangelinan*, No. 19-10077, 2020 WL 5118550, at \*2-5 (D. Kan. Aug. 31, 2020).

62. *Id.* at \*4.

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 resolved. Whether public policy considerations trump an accused's Confrontation rights does not present a clear black or white choice according to some courts and legal commentators. The easy answer is that the command of the Confrontation Clause is just that, a command. General concerns about the COVID-19 pandemic should not override a defendant's face-to-face Confrontation right. Yet, the contrary view that remote confrontation should satisfy the Sixth Amendment persists, and it will likely take intervention by the Supreme Court to resolve the issue. This Essay proposes the choice of the easy answer that remote confrontation would violate the Sixth Amendment, but the ultimate answer is yet to be revealed.

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63. *See id.* at \*1-2, \*4.

64. *Id.* at \*3; *United States v. Gigante*, 166 F.3d 75, 80-82 (2d Cir. 1999) (allowing the witness to appear remotely because his doctor considered it unsafe to travel due to him being mentally ill).

65. *United States v. Sapse*, No. 10-CR-00370, 2012 WL 5334630, at \*1 (D. Nev. 2012).