REL: July 8, 2022

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# Alabama Court of Criminal Appeals

## OCTOBER TERM, 2021-2022

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## CR-21-0141

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**Emiliano Rodriguez**

**v.**

**State of Alabama**

**Appeal from Houston Circuit Court**
**(CC-20-993)**

WINDOM, Presiding Judge.

AFFIRMED BY UNPUBLISHED MEMORANDUM.

Kellum and Cole, JJ., concur; McCool, J., dissents, with opinion, joined by Minor, J.; Minor, J., dissents, with opinion.

McCOOL, Judge, dissenting.

I respectfully dissent from this Court's unpublished memorandum affirming Emiliano Rodriguez's conviction. I believe that Rodriguez's constitutional right to confront the witnesses against him was violated when the Houston Circuit Court required the witnesses against him to wear opaque masks over their noses and mouths while testifying at trial. Thus, his conviction should be reversed.

Let me state from the outset that I am sensitive to the authority of the trial judge to control his or her courtroom and even to impose reasonable measures for the protection of the court and its participants, but that authority is not unlimited. Such measures must not run afoul of any of the many constitutional rights afforded the defendant. To put it another way, the trial court's authority ends where a constitutional violation begins. And I cannot think of a more egregious constitutional violation than an infringement on the right to confront one's accusers.

Before trial, Rodriguez's counsel filed a motion asking the trial court to require each witness to wear a clear face shield rather than an opaque mask that covered the witness's nose and mouth. Initially, the trial court granted that motion and ordered that, when testifying,

witnesses would wear clear face shields instead of masks. However, during oral proceedings the day before the trial, the trial court reversed course and stated that witnesses would be required to wear masks while testifying. Defense counsel argued that, to comply with the Constitution, the witnesses "are going to have to put a face shield on so we can see the facial reactions." (R. 16.) Then, the following exchange occurred:

> "The Court: No. I'm not going to do that either, because I have got to sit up there close to them. They are sitting right up there next to [the court reporter]. And despite the fact that there's acrylic shields up there, this Delta variant [of Covid] is extremely contagious, and I'm going to say no.
>
> "[Defense counsel]: And, Judge, I need to point out – I can't remember if I've got it in this motion or the trial with Judge Anderson –
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> "The Court: I don't care what Judge Anderson did.
>
> "[Defense counsel]: There's two Supreme Court cases in the United States about that.
>
> "The Court: Well, that's fine. I'll take my chances that you get me reversed if he gets convicted.
>
> "[Defense counsel]: Okay."

(R. 16-17.) Defense counsel then specifically renewed his objection to "witnesses not having a face shield on where you can see their facial reactions." (R. 18.) The trial court overruled that objection. The next

day, immediately before the trial began, defense counsel renewed his objection again, and the trial court again overruled it. Rodriguez raised this issue again in his motion for a new trial, which the trial court denied.

Further, I note the following timeline concerning Rodriguez's trial and the COVID-19 pandemic. On March 13, 2020, in response to the COVID-19 pandemic, the Alabama Supreme Court declared a state of emergency for the entire Judicial Branch of the State of Alabama, and the Court proceeded to issue several administrative orders related to the COVID-19 pandemic over the next several months. However, on July 7, 2021, the Alabama Supreme Court issued an administrative order declaring that the state of emergency for the Judicial Branch of the State of Alabama had ended, and the Court revoked all previous administrative orders issued by the Court related to the COVID-19 pandemic, except for an order that extended provisions pertaining to settlements in workers' compensation cases. Rodriguez's trial was held in the Houston Circuit Court on July 27, 2021. Then, on August 20, 2021, the Alabama Supreme Court declared a temporary state of emergency for the entire Judicial Branch of the State of Alabama due to recent increases in COVID-19

infections in certain areas of the State of Alabama. Thus, no state of emergency existed at the time of Rodriguez's trial.

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause applies to the States through the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Pointer v. Texas, 380 U.S. 400, 403-05 (1965). Likewise, the Alabama Constitution provides that "in all criminal prosecutions, the accused has a right … to be confronted by the witnesses against him." Ala. Const. Art. I, § 6

In Coy v. Iowa, 487 U.S. 1012 (1988), the United States Supreme Court held that the defendant's Sixth Amendment right to confront the witnesses against him was violated when a screen blocking the defendant from the sight of two child witnesses in a child-abuse case was placed between him and them when they testified against him at trial. The Court confirmed that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." Coy, 487 U.S. at 1016. In deciding that the right to

confrontation was in fact violated by the screen in this case, the Court stated that "[i]t is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter." Id. at 1020. The Court "le[ft] for another day … the question whether any exceptions [to the literal meaning of the Confrontation Clause] exist" and stated that "[w]hatever they may be, they would surely be allowed only when necessary to further an important public policy." Coy, 487 U.S. at 1021. Further, "[s]ince there ha[d] been no individualized findings that these particular witnesses needed special protection, the judgment … could not be sustained by any conceivable exception." Id.

Two years later, in Maryland v. Craig, 497 U.S. 836 (1990), the United Supreme Court, in a 5-4 decision, held that the Confrontation Clause of the Sixth Amendment did not categorically prohibit a child witness in a child-abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one-way closed-circuit television. The Court recognized that in Coy, "[i]n holding that the use of th[e] procedure [at issue in that case] violated the defendant's right to confront witnesses against him, we suggested that any exception to the right 'would surely be allowed only when necessary to further an

important public policy' -- i.e., only upon a showing of something more than the generalized, 'legislatively imposed presumption of trauma' underlying the statute at issue in that case." Craig, 497 U.S. at 844-45. The Court then stated that "[b]ecause the trial court in this case made individualized findings that each of the child witnesses needed special protection, this case requires us to decide the question reserved in Coy," i.e., whether any exceptions to the literal meaning of the Confrontation Clause exist. Id. at 845.

The Court noted that it had never held "that the Confrontation Clause guarantees criminal defendants the absolute right to a face-to-face meeting with witnesses against them at trial." Craig, 497 U.S. at 844. Nevertheless,

> "[t]hat the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with. As we suggested in Coy, our precedents confirm 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."

Craig, 497 U.S. at 850.

The Court stated that "[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal

defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Craig, 497 U.S. at 845. The Court listed the "elements of confrontation" as (1) "physical presence," (2) "oath," (3) "cross-examination," and (4) "observation of demeanor by the trier of fact," and the Court stated that "[t]he combined effect of these elements … serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." Id. at 846. Further, the Court "confirm[ed] 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." Id. at 850.

Lastly, the Court stated that "[t]he critical inquiry in this case, therefore, is whether use of the procedure is necessary to further an important state interest." Craig, 497 U.S. at 852. In answering that inquiry, the Court stated that,

> "if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma

> of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.
>
> "The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify."

Craig, 497 U.S. at 855. Thus, before any exception to the defendant's right to confrontation is made, the burden is on the State to show that the exception is necessary, and the trial court must receive evidence, which could include the trial judge's own personal knowledge, and make the requisite case-specific finding of necessity.

Therefore, under Craig, a defendant's right to confrontation under the Sixth Amendment consists not only of physical presence at trial, but also of requiring the witness to testify under oath, requiring the witness to submit to cross-examination, and "observation of demeanor by the trier of fact." It is "the combined effect of these elements serves the purposes of the Confrontation Clause." Craig, supra. However, it appears that elements of confrontation can be interfered with and an exception made if the interference is (1) necessary to further an important public policy and (2) where the reliability of the testimony is otherwise assured.

However, the burden is on the State to show that the exception is necessary, and the trial court must receive evidence and make the requisite individualized finding of necessity.

I note that there is some question concerning the continuing applicability of the Craig reliability standard because after Craig was decided, the United States Supreme Court decided Crawford v. Washington, 541 U.S. 36 (2004). In Crawford, the Court held that, under the Confrontation Clause, any testimonial out-of-court statement by a witness is not admissible unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness, regardless of whether such statement is deemed reliable by court. Nevertheless, Craig has not been explicitly overruled, and, as the Supreme Court noted in White v. Illinois, 502 U.S. 346, 358 (1992), "Coy and Craig involved only the question of what in-court procedures are constitutionally required to guarantee a defendant's confrontation right once a witness is testifying. Such a question is quite separate from that of what requirements the Confrontation Clause imposes as a predicate for the introduction of out-of-court declarations. Coy and Craig did not

speak to the latter question." Thus, I examine the present case under Coy and Craig as controlling precedent.

In the present case, the "observation of demeanor by the trier of fact," which is a component of the right to confrontation under the Sixth Amendment, was interfered with by the trial court's requirement that the witnesses against Rodriguez wear opaque masks that covered the nose and the mouth. That component of confrontation is extremely important because it is the way the jury judges the credibility of the witnesses, and that credibility determination usually has an even higher importance in rape cases, such as the one at bar. As the United States Court of Appeals of the Third Circuit has explained,

> "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. It is indeed rarely that a cross-examiner succeeds in compelling a witness to retract testimony which is harmful to his client, but it is not infrequently that he leads a hostile witness to reveal by his demeanor … that his evidence is not to be accepted as true, either because of partiality or overzealousness or inaccuracy, as well as outright untruthfulness. The demeanor of a witness, as Judge Frank said, is 'wordless language.' Broadcast Music Inc. v. Havana

> Madrid Restaurant Corp., 175 F.2d 77, 80 (2 Cir. 1949). It is in recognition of the superior advantage which observation of the demeanor of the witness confers on the fact finder that a reviewing court must accept as true whatever evidence supports the verdict of a jury and that in trials without a jury Rule 52(a) of the Federal Rules of Civil Procedure provides: 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.'
>
> "The significance of demeanor evidence reaches heightened importance on a charge such as rape, for there is now widespread recognition of the special psychological elements inherent in charges of sexual abuse. Special caution must be exercised in such cases, and the credibility of the complainant is of crucial importance."

Government of Virgin Islands v. Aquino, 378 F.2d 540, 548 (3rd Cir. 1967) (footnote omitted).

My own experience from 25 years of trial practice confirms the wisdom of the Third Circuit's findings in Aquino as to the significance of observing demeanor in determining the credibility of a witness's testimony. In many cases, even when a witness testified detrimentally to the position of my client (when I was in private practice) or the State (when I was a prosecutor), I was nonetheless able to successfully argue that, based on the witness's demeanor while testifying, the trier of fact should disregard that witness's testimony as unreliable. Whether a trembling lip, an involuntary tic of the cheek, or a snarky smile, it was

imperative that the jury be able to view the face of the witness while he or she was testifying. Obscuring the mouth and nose of a witness not only hampers the State's attorney in presenting evidence, but more importantly unconstitutionally limits the right of the defendant to confront the witnesses against him.

I do not think that anyone can seriously argue that completely covering a witness's mouth and nose has no effect on being able to observe the witness's demeanor. Even the main case relied on by the majority, United States v. Crittenden, [No. 4:20-CR-7 (CDL), August 21, 2020] ___ F. Supp. 3d ___ (M.D. Ga. 2020), while somewhat downplaying its importance, recognized that, "[o]f course, the masks will eliminate two aspects of demeanor for the jury to consider: movement of the nose and mouth." Further, the district court in Crittenden applied the Craig reliability test to reach its holding. That application would have been unnecessary if no element of the Confrontation Clause was interfered with. Thus, it appears that the court rightfully recognized that covering the witness's nose and mouth with an opaque mask affects the ability of the jury to observe the witness's demeanor. The other cases cited in the unpublished memorandum, which like Crittenden are not binding on this

Court, either rely directly on Crittenden or, in the case of United States v. Tagliaferro, 531 F. Supp. 3d 844 (S.D.N.Y. 2021), are factually distinguishable because the witnesses at trial were in fact unmasked while testifying.

Having established that the masks in the present case interfered to some degree with an element of Rodriguez's right to confrontation under the Sixth Amendment, i.e., interfered with the observation of demeanor by the trier of fact, I turn to the Craig reliability test and the burden that it imposes. Under Craig, an element of confrontation can be interfered with only if the interference is (1) necessary to further an important public policy and (2) the reliability of the testimony is otherwise assured. Further, the burden is on the State to show that the interference is necessary, and the trial court must receive evidence before it makes the requisite finding of necessity.

Presumedly, the important public policy in this case is protection from the COVID-19 virus. To be clear, Rodriguez did not have the burden of proving that his constitutional rights should not be interfered with by the measures imposed by the court in furtherance of that policy. Rather, as I have already pointed out, the State bore the burden of proving that

any measures imposed were necessary to further the public policy under consideration. In the present case, the trial court did not make any individualized findings as to this public policy or the necessary remedy in furtherance of that policy, and no evidence regarding this issue was presented or considered by the trial court. Certainly it is clear that the COVID-19 pandemic existed, but I find it significant that the State did not ask for these measures to be imposed, but merely stood silent as the trial judge imposed them on his own.

Moreover, at the time of Rodriguez's trial, the Alabama Supreme Court had declared that the COVID-19 state of emergency for the Judicial Branch of the State of Alabama had ended, and the Court had revoked all applicable administrative orders issued by the Court related to the COVID-19 pandemic. Because there was no individualized finding concerning the policy at issue in this case or a finding that the reliability of the testimony in this particular case was otherwise assured, the requisite individualized finding required by Coy and Craig was not satisfied and Rodriguez's constitutional right to confront the witnesses against him was violated.

In the face of a global pandemic, many people across the nation understandably reacted in trepidation and fear. But history has taught us that, during times of emergency and crisis, constitutional rights are at risk as at no other time. I believe that such times are when these rights should be protected the most. Is our Constitution so flimsy that it cannot endure the onslaught of a microscopic virus? I do not believe that it is. And as serious and frightening as the COVID era has been for many people, I find an era in which defendants are convicted based on the testimony of masked witnesses before triers of fact who do not have the opportunity to observe the telltale signs of deception – or sincerity – to be more frightening still.

Because I do not believe that Rodriguez's constitutional right to confront the witnesses against him was protected in this trial, I would reverse the judgment in this case and send it back for a new trial. Upon retrial, the judge may still impose reasonable measures for protecting the court and its participants; however, these measures may not restrict the defendant's right of confrontation.

Based on the foregoing, I would reverse the trial court's judgment. Though, I respectfully dissent.

Minor, J., concurs.

MINOR, Judge, dissenting.

Almost three weeks after the Alabama Supreme Court ended the state of emergency it had declared for the judicial branch because of COVID-19, Emiliano Rodriguez moved the trial court to require the witnesses testifying against him to wear face shields rather than masks. Rodriguez argued that he could not exercise his Sixth Amendment right to confront the witnesses against him if those witnesses were wearing masks covering their noses and mouths while testifying. The trial court denied Rodriguez's motion. I believe the trial court's actions violated Rodriguez's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution,[1] and I thus respectfully dissent from the Court's decision to affirm Rodriguez's conviction for

[1]The Sixth Amendment to the United States Constitution provides, in part: "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him …." For a brief history of the origins of the Confrontation Clause, see Nicole Morrison, If the Mask Fits: The Unconstitutionality of Face Masks in Criminal Trials During COVID-19," 72 Mercer L. Rev. 1261, 1265-67 (2021).

Art. I, § 6, Ala. Const. 1901 (Off. Recomp.), provides, in part: "[I]n all criminal prosecutions, the accused has a right … to be confronted by the witnesses against him ...."

second-degree rape, see § 13A-6-62, Ala. Code 1975, and his sentence to 17 years' imprisonment.

A grand jury indicted Rodriguez for second-degree rape in November 2020. The trial court scheduled Rodriguez's trial for June 2021. Just before trial, Rodriguez moved to require jurors during voir dire and witnesses during testimony to wear face shields instead of masks, which the trial court had required in response to the COVID-19 pandemic. (C. 52.) Rodriguez asked for a continuance if this motion could not be granted. The trial court granted Rodriguez's motion to require face shields instead of masks but reserved the right to modify the order as it "deem[ed] appropriate in its sole discretion." (C. 56.)

Because Rodriguez's interpreter had a conflict of interest, the parties agreed on June 15, 2021, to continue the trial. (C. 60.) The trial court rescheduled the trial for July 26, 2021. The day before the trial was to begin, Rodriguez again made his request for witnesses to wear face shields instead of masks:

> "[DEFENSE COUNSEL]: Judge, I would like to withdraw one of my motions that I did at the previous trial and you granted it. At the previous trial, I asked for the jurors to have face shields on. I'm going to withdraw that motion at this time because of COVID.

> "THE COURT: Well, thank you, because I was going to bring that up next.
>
> "[DEFENSE COUNSEL]: However, I would—and this is the one I think Constitution speaks loudly on. I don't think we can avoid that when the witness takes the stand, they are going to have to put a face shield on so we can see the facial reactions.
>
> "THE COURT: No. I'm not going to do that either, because I have got to sit up there close to them. They are sitting right up there next to [the court reporter]. And despite the fact that there's acrylic shields up there, this Delta variant [of COVID] is extremely contagious, and I'm going to say no.
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> "[DEFENSE COUNSEL]: And, Judge, I need to point out—I can't remember if I've got it in this motion or the other trial with Judge Anderson—
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> "THE COURT: I don't care what Judge Anderson did.
>
> "[DEFENSE COUNSEL]: There's two Supreme Court cases in the United States about that.
>
> "THE COURT: Well, that's fine. I'll take my chances that you get me reversed if he gets convicted."

(R. 15-17.)[2]

On appeal, Rodriguez argues that the trial court violated his rights under the Confrontation Clause of the Sixth Amendment by requiring

[2]The day of trial, Rodriguez again moved for the trial court to require face shields rather than masks, and the trial court denied that motion. (R. 128.)

witnesses to wear masks rather than clear face shields that would have made witnesses' noses and mouths visible. Rodriguez acknowledges that a few courts have upheld, because of the COVID-19 pandemic, permitting or requiring witnesses to wear masks while testifying. Those courts, Rodriguez points out, have examined the question under the reasoning of Maryland v. Craig, 497 U.S. 836 (1990), in which the United States Supreme Court held "that although face-to-face confrontation is not an absolute constitutional requirement, it may be abridged only where there is a case-specific finding of necessity." 497 U.S. at 857-58 (cleaned up). After stating that its "precedents confirm 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 where reliability of the testimony is otherwise assured," 497 U.S. at 850 (emphasis added), the Craig Court held that, under the circumstances, the State had shown that the child witness there could testify by a "one-way closed circuit television procedure" without violating the defendant's rights under the Confrontation Clause.

The Craig Court emphasized that, for such a procedure not to violate the Confrontation Clause, the trial court must make a case-specific finding of necessity. That finding must include three determinations: (1) that use of the procedure is needed "to protect the welfare of the particular child witness who seeks to testify"; (2) "that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant"; and (3) "that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis, i.e., more than 'mere nervousness or excitement or some reluctance to testify.'" 497 U.S. at 855-56.

The decisions that this Court cites in support of affirming the trial court's judgment used the reasoning of Craig to balance competing interests and uphold the mask requirements at issue. See United States v. Tagliaferro, 531 F. Supp. 3d 844 (S.D.N.Y. 2021); United States v. Maynard (S.D. W. Va. No. 2:21-cr-00065, Nov. 3, 2021) (unpublished order); United States v. Holder, (D. Colo. No. 180cr000381-CMA-GPG-01, Sept. 21, 2021) (unpublished order); United States v. Crittenden, (M.D. Ga. No. 4:20-CR-7 (CDL), Aug. 21, 2020) (unpublished order). In concluding that the mask requirement for witnesses did not violate

Rodriguez's rights under the Confrontation Clause, this Court, in its unpublished memorandum, reasons:

> "[R]equiring all persons present in the courtroom to wear masks furthered the public policy of protecting against the substantial health risks presented by the COVID-19 virus, particularly in an indoor setting such as courtroom. Wearing masks not only protects the safety of the trial participants, but public health more broadly by seeking to limit the spread of the virus. '[U]nder the Court's mask procedure, witnesses against the Defendant will be physically present in the courtroom, they will testify under oath, and Defendant will be able to have these witnesses cross-examined in the open courtroom in front of the Defendant and the jurors. The Defendant and jury will also be able to observe the witnesses' demeanor, although they will not be able to see their nose[s] and mouth[s]. The Court finds that this restriction does not diminish the face-to-face nature of the confrontation contemplated by the Confrontation Clause.' Crittenden, supra, at 6. 'To whatever slight extent masks impinge on [a defendant's] Confrontation Clause right to see a witness's full facial expressions, requiring them is justified by important public policy interests to protect the health and safety of those in the courthouse while allowing court functions to proceed during a pandemic.' Maynard, supra, at 2. Therefore, Rodriguez's constitutional right to confront witnesses was not violated, and the circuit court did not abuse its discretion when it required witnesses to wear masks during trial."

Rodriguez characterizes decisions like those as "labored" in their conclusions that requiring or permitting a witness to wear a mask while testifying against a defendant does not violate the Confrontation Clause. Rodriguez's characterization is sound, and it points to a larger question

about the continuing validity, after Crawford v. Washington, 541 U.S. 36 (2004), of Craig, to the extent that it subjects a defendant's right to face-to-face confrontation to a balancing of interests.

In Crawford, the United States Supreme Court held that a court could not admit testimonial hearsay of an unavailable witness based on "adequate indicia of reliability." 541 U.S. at 42, 68-69. Instead, the Court held that a trial court could admit testimonial hearsay only if the defendant had an earlier, adequate chance to cross-examine the unavailable witness. Id.

As Judge Sutton of the United States Circuit Court of Appeals for the Sixth Circuit has noted, although Crawford did not overrule Craig, the two decisions are in tension on at least six points: (1) Craig relied almost exclusively on Ohio v. Roberts, 448 U.S. 56 (1980), a decision that Crawford overruled as to "testimonial statements"; (2) "Craig treated the [Confrontation] Clause as a safeguard for evidentiary reliability as measured by the judge in that case and today's rules of evidence …. But Crawford held that it was a procedural guarantee that 'commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination' in front of the

accused"; (3) Craig characterized the right to face-to-face confrontation as "not absolute," but Crawford described it as essential; (4) Craig relied on newer "academic literature" to examine the validity of exceptions to the right of confrontation, but Crawford relied on "the original publicly understood meaning of confrontation to determine when the exception-free words of the guarantee ('[i]n all criminal prosecutions') should have exceptions"; (5) Craig was concerned that a literal interpretation of the Confrontation Clause would abrogate current rules of evidence, but Crawford emphasized that rules of evidence must yield to the rights protected by the Confrontation Clause; and (6) Craig did not suggest "any limit to the kinds of exceptions that the Roberts balancing test would allow then or in the future[, b]ut Crawford carefully identified the kinds of exceptions that might be allowed under its approach and conspicuously never mentions Craig as one of them." United States v. Cox, 871 F.3d 479, 492-93 (6th Cir. 2017) (Sutton, J., concurring). I share Judge Sutton's opinion that Craig and Crawford appear to be irreconcilable. Id. at 493-95.

Even if a balancing test like that in Craig applies to Rodriguez's case, the trial court's brief statements about the need for masks rather

than face shields do not satisfy the requirement in Craig that a trial court make a case-specific finding of necessity. Although masking requirements were generally widespread in 2020 and the first part of 2021, the above-quoted exchange shows that another judge in the same courthouse had considered a similar request from the attorney representing Rodriguez. Yet the trial court cited no authority and little facts in support of its decision to reject Rodriguez's request for face shields instead of masks. Indeed, almost three weeks before Rodriguez's trial, the Alabama Supreme Court declared that "the state of emergency for the Judicial Branch of the State of Alabama" had ended, and the Court revoked all relevant administrative orders related to the COVID-19 pandemic. (Administrative Order No. 11: Revoking Previous Administrative Orders Related to COVID-19 Pandemic Emergency Response, July 7, 2021.)

In support of his position, Rodriguez cites United States v. Thompson, 543 F. Supp. 3d 1156 (D.N.M. 2021), decided June 11, 2021, in which the trial court ruled that witnesses had to wear face shields rather than masks. In Thompson, the defendant moved for the district court to allow jurors to wear their face masks during voir dire and

witnesses to remove their masks while testifying. The district court stated:

> "[Thompson] notes that jury selection has been drastically altered since the COVID-19 pandemic began in March 2020. In support of his request, he notes that the ability to observe jurors' facial expressions and body language is essential to the intelligent and meaningful exercise of peremptory challenges. [Motion in limine] at 2 (citing United States v. Ruiz, 894 F.2d 501, 506 (2d Cir. 1990) (allowing excusal of juror making 'facial expressions' suggesting 'that she really did not want to sit'); Barfield v. Orange County, 911 F.2d 644, 648 (11th Cir. 1990) (holding that hostile facial expressions and body language are race neutral)). He asks that jurors be provided clear face masks so that counsel can effectively evaluate each juror's demeanor during jury selection. Id. Additionally, he argues that face mask removal for witnesses while they testify is necessary to his Sixth Amendment right to physically face those who testify against him. Id. at 3 (citing Crawford, 541 U.S. at 42, 124 S. Ct. 1354; Coy v. Iowa, 487 U.S. 1012, 1017, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988)). He asserts that the removal of face masks will allow him to 'actually hear' the witness and observe facial expressions, which 'are a critical component of body language and demeanor' and 'contribute significantly to the determination of credibility.' Id. …
>
> "The Court continues to evaluate its response to the spread of COVID-19 in order to balance the need to assist in the preservation of public safety and health while effectively administering justice during this period of national emergency. The Court is following all applicable Administrative Orders issued in the United States District Court for the District of New Mexico. On May 18, 2021, Administrative Order 21-MC-00004-17 was issued in accordance with the Centers for Disease Control and Prevention ('CDC') guidelines regarding COVID-19 safe

practices for fully vaccinated individuals[1] and the New Mexico Department of Health ('NMDOH') clarifying Public Health Emergency Order. This Administrative Order states that all persons entering courthouse facilities who are not fully vaccinated are still required to wear a face mask and socially distance from other individuals. Individuals who are fully vaccinated do not need to wear a face mask or socially distance from others. The Court will not be inquiring about the vaccination status of potential jurors and witnesses, but it will inform them that if they are fully vaccinated then they are not required to wear a face mask.

"The Court agrees with Mr. Thompson that an unimpeded opportunity to cross-examine adverse witnesses face-to-face and in full view of the jury is core to the Sixth Amendment right of confrontation. As the Supreme Court explained over 125 years ago:

> "'The primary object of [this provision] 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.'

"Mattox v. United States, 156 U.S. 237, 242-43, 15 S. Ct. 337, 39 L. Ed. 409 (1895) (emphasis added). The Court will require testifying witnesses who do not remove their masks after being informed that vaccinated individuals do not need to wear a face mask to replace their face mask with a clear face shield. This will appropriately strike the balance of minimizing health risks, as the witnesses will be situated

apart from other trial participants on the witness stand, and retaining the full force of Mr. Thompson's Sixth Amendment rights.

"However, prospective jurors during voir dire are not separated from one another in the way that testifying witnesses are. Requiring prospective jurors who have kept their face masks on to remove their masks will therefore create an unacceptable health risk in light of COVID-19. Unlike with the Confrontation Clause issue with masked witnesses, the Court is aware of no authority, nor has Mr. Thompson cited any, holding that the Sixth Amendment right to an impartial jury or Due Process demand that the defendant have unimpeded visual access to prospective jurors' facial expressions during jury selection. See, e.g. United States v. Robertson, No. 17-CR-02949-MV-1, 2020 WL 6701874, at *2 (D.N.M. Nov. 13, 2020). The Court believes that Mr. Thompson's ability to ask questions during voir dire and to see the upper half of prospective jurors' faces is enough to satisfy his constitutional rights during jury selection, at least during an ongoing a global pandemic.

"For the foregoing reasons, Mr. Thompson's Face Mask [motion in limine] will be granted in part. The Court will announce that vaccinated individuals are not required to wear their face masks and will order testifying witnesses whose face masks remain on to replace their masks with clear face shields. The Court will not order jurors and prospective jurors who keep their face masks on to replace their masks with clear face shields."

"_____

"[1]See CDC, Interim Public Health Recommendations for Fully Vaccinated People (May 13, 2021), https://www.cdc.gov/coronavirus/2019-ncov/ vaccines/fully-vaccinated-guidance.html."

Thompson, 543 F. Supp. 3d at 1163-65.

I do not think that Craig necessarily requires an analysis as detailed as that in Thompson. But in my view Craig requires more than the trial court's cursory rejection of Rodriguez's request that witnesses wear face shields rather than masks. And under these facts, I do not think the trial court's error in refusing Rodriguez's request was harmless. Although the testimony of the 15-year-old victim alone was enough to support Rodriguez's conviction, DNA evidence did not support the victim's testimony—or that of her sister. Testing of genital, vaginal, and oral swabs from the victim, as well as testing of the victim's underwear, showed the presence of semen, but DNA testing did not show a match to Rodriguez's DNA profile.[3]

[3]The State's evidence at trial included testimony from B.L., who testified that Rodriguez was dating B.L.'s mother. B.L. testified that on May 7, 2018, while B.L.'s mother was in the shower, Rodriguez told B.L. that, if she wanted to get her cellular telephone back, she would have to take off her shorts and underwear and get on the bed. B.L. said Rodriguez then had sex with her. After Rodriguez had finished, B.L.'s sister opened the door to the bedroom. B.L.'s sister testified that B.L. was on the bed without shorts or underwear on and that Rodriguez had his pants on but was out of breath. B.L. told her two sisters what had happened, and she was taken to the hospital for a sexual-assault exam.

On balance, I cannot say that face-to-face confrontation of the witnesses in this case—unimpeded by masks—would not have made a difference in the outcome of Rodriguez's trial. Cf. Cox, 871 F.3d at 494 (Sutton, J., concurring) ("How essential is face-to-face confrontation under the Confrontation Clause? Craig acknowledged that it is important but could be balanced away. 497 U.S. at 856-57, 110 S. Ct. 3157. In his Craig dissent, Justice Scalia disagreed, noting that 'whatever else it may mean,' '"to confront" plainly means to encounter face-to-face.' Id. at 864, 110 S. Ct. 3157. In Crawford, he reiterated the view he expressed in Craig. 541 U.S. at 42-45, 57-60, 124 S. Ct. 1354. 'Virtual confrontation might be sufficient to protect virtual constitutional rights.' Order of the Supreme Court, 207 F.R.D. 89, 93 (2002) (Scalia, J.). But does it suffice 'to protect real ones'? Id. The question deserves an answer."). Thus, I would reverse the judgment of the trial court.

I respectfully dissent.