Order

Michigan Supreme Court
Lansing, Michigan

August 25, 2009

ADM File No. 2007-13

Amendment of Rule 611
of the Michigan
Rules of Evidence

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 611 of the Michigan Rules of Evidence is adopted, effective September 1, 2009.

[Deletions are indicated by strikeover and insertions by underline.]

Rule 611. Mode and Order of Interrogation and Presentation

(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Appearance of Parties and Witnesses. The court shall exercise reasonable control over the appearance of parties and witnesses so as to (1) ensure that the demeanor of such persons may be observed and assessed by the fact-finder and (2) ensure the accurate identification of such persons.

(b)-(c)[Relettered (c)-(d), but otherwise unchanged.]

CORRIGAN, J. (*concurring*). I concur in the Court's adoption of this amendment. Requiring trial courts to "exercise reasonable control over the appearance of parties and witnesses" is consistent with the historical importance in our legal system of the trier of fact's assessment of a witness's demeanor and with the constitutional right of a criminal defendant to confront his accusers face to face.

I. The Underlying Case

This rule amendment arose from a small claims action in Michigan's 31st District Court. The plaintiff, Ginah Muhammad, wore a niqab, a garment that covered her entire face, except for a slit for her eyes. As Muhammad was preparing to testify, Judge Paul Paruk asked her to remove her niqab:

> "One of the things I need to do as I am listening to testimony is I need to see your face and I need to see what's going on and unless you take [niqab] off, I can't see your face and I can't tell whether you're telling me the truth or not and I can't see certain things about your demeanor and temperament that I need to see in a court of law." [*Muhammad v Paruk*, 553 F Supp 2d 892, 896 (ED Mich, 2008), quoting the small claims hearing transcript.]

Muhammad replied:

> "I'm a practicing Muslim and this is my way of life and I believe in the Holy Koran and God is first in my life. I don't have a problem with taking my veil off if it's a female judge, so I want to know do you have a female that I could be in front of then I have no problem but otherwise, I can't follow that order." [*Id.*]

Judge Paruk explained that no female judge was available and suggested that the veil was a "custom thing" rather than a "religious thing." Muhammad strongly objected to that characterization. Judge Paruk gave Muhammad a choice between removing the veil and having the case dismissed. Muhammad chose not to remove her veil and Judge Paruk dismissed the case without prejudice. *Id.*

Muhammad subsequently filed a suit under 42 USC 1983 against Judge Paruk in federal district court, alleging a violation of her right of free exercise of religion under the First Amendment and her civil right to access to the courts. District Judge John Feikens declined to exercise jurisdiction over the case. Muhammad appealed to the United States Court of Appeals for the Sixth Circuit. *Muhammad v Paruk*, No. 08-1754 (CA 6, filed June 4, 2008.)

II. Demeanor Evidence and the Confrontation Clause[1]

[1] I refer the reader to Timothy A. Baughman's excellent discussion of relevant Confrontation Clause cases in his May 25, 2009, letter to this Court, which is included as an appendix to this statement.

As Judge Learned Hand pointed out in *Dyer v MacDougall*, 201 F 2d 265, 268-269 (1953):

> It is true that the carriage, behavior, bearing, manner and appearance of a witness—in short, his "demeanor"—is a part of the evidence. . . . [S]uch evidence may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.

The importance of demeanor evidence is even more fundamental in a criminal case. The right of a criminal defendant "to be confronted with the witnesses against him," US Const, Am VI, has "a lineage that traces back to the beginnings of Western legal culture." *Coy v Iowa*, 487 US 1012, 1015 (1988). "[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as essential to a fair trial in a criminal prosecution." *Id.* at 1017 (quotation marks and citation omitted).

In *Coy*, the trial court permitted two child witnesses against the defendant to testify behind a screen that prevented them from seeing the defendant. The jury convicted the defendant of two counts of lascivious acts with a child. *Id.* at 1014. The United States Supreme Court reaffirmed that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Id.* at 1016. Writing for the majority, Justice Scalia concluded that the defendant's right of confrontation was violated: "It 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 exist." *Id.* at 1021.

In *Maryland v Craig*, 497 US 836 (1990), the witness—a child the defendant was accused of sexually assaulting—was permitted to testify using a one-way closed circuit television procedure established by Maryland statute. *Id.* at 843. The statute permits a trial court to take testimony using this procedure if it finds that testifying in the courtroom would cause the child such serious emotional distress that the child would be unable to reasonably communicate. *Id.* at 840-842. The procedure allowed the defendant and the jury to see the witness but prevented the witness from seeing the defendant. *Id.* at 841, 843.

The Court opined that although the right of a criminal defendant to meet face to face with the witnesses against him was not absolute, *Id.* at 844, "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. The Court emphasized that although Maryland's procedure does not permit face-to-face confrontation, it "preserves all of the other elements of the confrontation right: The child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies." *Id.* at 851. The Court opined that "the presence of these other elements of confrontation—oath, cross-examination, and observation of a witness' demeanor—adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony." *Id.* It concluded that the use of the procedure at issue, "where necessary to further an important state interest, does not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause." *Id.* at 852.[2]

In addition, state and federal courts have recently considered whether and under what circumstances testimony taken while a witness's eyes or face are not visible to the trier of fact violates a criminal defendant's right of confrontation. In *Morales v Artuz*, 281 F3d 55 (CA 2, 2002), the trial court permitted a key witness to testify while wearing sunglasses after she refused to take them off because of her fear. It concluded that any infringement on the defendant's right to confront the witness was outweighed by the necessity of the witness's testimony. *Id.* at 57. The Second Circuit acknowledged that there was "some impairment" of the jury's ability to assess the witness's demeanor. *Id.* at 60. It noted that "[s]eeing a witness's eyes has sometimes been explicitly mentioned as of value in assessing credibility." *Id.* It concluded, however, that "[t]he obscured view of the witness's eyes . . . resulted in only a minimal impairment of the jurors' opportunity to assess her credibility" because "the jurors had an entirely unimpaired opportunity to assess the delivery of [the witness's] testimony, notice any evident nervousness and observe her body language," in addition to "their consideration of the substance of her testimony, assessing her opportunity to observe, the consistency of her account, any hostile motive, and all the other traditional bases for evaluating testimony." *Id.* at 61-62.[3]

---

[2] In a dissenting opinion joined by Justices Brennan, Marshall, and Stevens, Justice Scalia criticized the majority's holding as "antitextual," *id.* at 863 (Scalia, J., dissenting): "Whatever else it may mean in addition, the defendant's constitutional right to be confronted with the witnesses against him means, always and everywhere, at least what it explicitly says: the right to meet face to face all those who appear and give evidence at trial." *Id.* at 862 (Scalia, J., dissenting) (quotation marks and citations omitted.)

[3] Because the case was before the court on habeas review, the applicable standard required the court to consider whether the state courts unreasonably applied clearly established federal law as determined by the United States Supreme Court. 28 USC 2254(d). The court "doubt[ed] that permitting [the witness] to testify behind dark sunglasses was contrary to constitutional law established by the Supreme Court, but even

In *Romero v State*, 173 SW3d 502 (Tex Crim App, 2005), the trial court permitted the witness to testify wearing a baseball cap, dark sunglasses, and a jacket with an upturned collar, after the witness refused to enter the courtroom without his "disguise" because of his fear of the defendant. The Texas Court of Criminal Appeals held that this violated the defendant's right to confront his accusers. Citing *Craig*, it started with the proposition that "[a]n encroachment upon face-to-face confrontation is permitted only when necessary to further an important public interest and when the reliability of the testimony is otherwise assured." *Id.* at 505, citing *Craig*, *supra* at 850. "Whether the reliability of the testimony is otherwise assured turns upon the extent to which the proceedings respect the four elements of confrontation: physical presence, oath, cross-examination, and observation of demeanor by the trier of fact." *Id.*, citing *Craig*, *supra* at 846. The Texas court observed that, unlike in *Craig*, *both* the "physical presence" and "observation of demeanor" elements were impaired. *Id.* at 505-506. With respect to the observation of demeanor, the court stated that while the witness's disguise, in itself, may be relevant to the jury's assessment of demeanor, that was no substitute for the ability to observe the witness's face "the most expressive part of the body and something that is traditionally regarded as one of the most important factors in assessing credibility. To hold otherwise is to remove the 'face' from 'face-to-face' confrontation." *Id.* at 506.

Thus, the United States Supreme Court has recognized the value of face-to-face confrontation, and state and federal courts have applied the principles announced in *Coy* and *Craig* to trial proceedings in which witnesses were permitted to testify with their faces or eyes obscured. These decisions clearly illustrate the Confrontation Clause implications of a witness's appearance. MRE 611, as amended, requires trial courts to consider whether the witness's attire will inhibit the ability of the trier of fact to assess demeanor so much that it gives rise to a violation of the criminal defendant's right of confrontation. Because a trial judge who permits a witness to testify with her face hidden from the trier of fact may cause a violation of a criminal defendant's right to confront the witnesses against him, I urge trial courts to use caution in allowing this practice in criminal cases.

III. Exceptions to the Practice of Veiling

In light of the case that gave rise to this rule amendment and the opposition to the amendment on religious freedom grounds, it is also worth noting that some scholars suggest that "Islamic law accommodates exceptions to the practice of veiling because of 'necessity.'" *Freeman v Dep't of Highway Safety & Motor Vehicles*, 924 So 2d 48, 52 (Fla App, 2006) (describing the expert testimony of Dr. Kahaled Abou El Fadl.)

---

if the law of the Confrontation Clause, as established by the Supreme Court is . . . a generalized right to face-to-face confrontation, the state courts did not make an unreasonable application of such law. *Morales*, *supra* at 62.

According to "Islam Question & Answer," a website that "aims to provide intelligent, authoritative responses to anyone's question about Islam,"[4] "[t]he most correct opinion . . . is that it is obligatory [for a woman] to cover [her] face,"[5] but in certain exceptional situations, a woman may uncover her face in the presence of men other than her husband and close male family members. Among 12 listed exceptions are "Testimony" and "In court cases." Under the exception for "Testimony," "[i]t is permissible for a woman to uncover her face when she is giving testimony in court, whether she is a witness in a case or is there to witness a deal, and it is permissible for the qaadi (judge) to look at her in order to know who she is and to protect the rights of all concerned."[6] Similarly, under the exception for "court cases," the website states: "It is permissible for a woman to uncover her face in front of a qaadi (judge) who is to rule either in her favour or against her, and in this situation he may look at her face in order to know who she is and for the sake of protecting people's rights."[7]

In addition, Dawud Walid, "a leading voice for Muslims & Islam in Michigan,"[8] wrote about this issue before this Court's May 12, 2009, public hearing. Although Walid expressed his belief that an exception should be made for Muslim women who "believe sincerely that it is their bona fide religious right under the United States Constitution to wear [the niqab] in front of judges," he noted:

> In regards to wearing niqab in the front of judges, scholars of all schools of thought overwhelmingly state that niqab should not be worn in front of judges because facial expressions are a tool in which [sic] judges

---

[4] According to the website, "[t]he responses are handled by Sheikh Muhammad Salih al-Munajjid, using only authentic, scholarly sources based on the Quran and sunnah, and other reliable contemporary scholarly opinions." According to the website, Sheikh Muhammed Salih Al-Munajjid is "a known Islamic lecturer and author." <http://islamqa.com/en/ref/islamqapages/2> (accessed June 29, 2009.)

[5] <http://islamqa.com/en/ref/cat/56&page=4> (accessed June 29, 2009).

[6] *Id.*

[7] *Id.*

[8] Information here is from "Weblog of Dawud Walid": "The official blog of Dawud Walid, a leading voice for Muslims & Islam in Michigan." < http://dawudwalid.wordpress.com/> (accessed June 11, 2009.) Walid is also the Executive Director of the Michigan Chapter of the Council on American-Islamic Relations (CIAR). See the CIAR website: < http://www.cair.com/Chapters.aspx#CAIRMI> (accessed June 29, 2009).

> use to gauge the veracity of testimony. In Neo-Hanbali Saudi Arabia, which is the most "conservative" country in the Muslim world, women must remove niqab in front of judges.[9]

Amended MRE 611 is consistent with the historical value of the trier of fact's assessment of witness demeanor and with a criminal defendant's right to confront his accusers face to face. The suggestion that the practice of veiling sometimes yields to similar principles strengthens my support for the amendment.

MARKMAN, J. (*concurring*). I support the Court's adoption of MRE 611(b), which requires a trial court to exercise reasonable control over the appearance of parties and witnesses to (a) ensure that the demeanor of such persons may be observed and assessed by the fact-finder; (b) ensure the accurate identification of such persons; and (c) enforce the constitutional guarantee that a criminal defendant be "confronted with the witnesses against him." US Const, Am VI; Const 1963, art 1, § 20.

One of the hallmarks of our civilization is the equal application of the rule of law, i.e., the proposition that rights and responsibilities under our legal system apply equally to all, whatever a person's race, religion, or nationality, whatever a person's wealth or station. This is one of the most distinctive and remarkable attributes of our constitutional system, and it is imperative that this equal rule of law not be diluted, or subordinated to other considerations.

To paraphrase the United States Supreme Court in *Employment Div, Dep't of Human Resources of Oregon v Smith*, 494 US 872, 884-885 (1990),[10] critics of the Court's new rule essentially "contend that plaintiff's religious motivation for refusing to abide by the requirements of our legal system places her beyond the reach of a law that is not specifically directed at her practice." The Supreme Court responded to this argument by observing:

> [Critics] assert, in other words, that "prohibiting the free exercise of religion" includes requiring any individual to observe a generally applicable law . . . . [But] if prohibiting the exercise of religion . . . is not

---

[9] "Drama in MI Regarding Niqab in Courts," May 11, 2009 < http://dawudwalid.wordpress.com/2009/05/page/2/> (accessed June 29, 2009.) Walid also noted his personal belief "from an Islamic perspective that Muslim women should not wear niqab in front of judges."

[10] In *Smith* the United States Supreme Court held that Oregon's prohibition of the use of peyote in religious ceremonies, and the denial of unemployment benefits to persons discharged for such use, did not violate the Free Exercise Clause of the First Amendment.

> the object of the [law], but merely the incidental effect of a generally applicable and otherwise valid [law], the First Amendment has not been offended.
>
> * * *
>
> To make an individual's obligation to obey such law contingent upon the law's coincidence with his religious beliefs, . . . "to become a law unto himself", . . . contradicts both constitutional tradition and common sense. [*Id.* at 878-884.]

And, as the Court stated in *Lyng v Northwest Indian Cemetery Protective Ass'n*, 485 US 439, 448, 452 (1988), "[t]he free exercise clause . . . does not afford an individual a right to dictate the conduct of the Government's internal procedures. . . . [G]overnment simply could not operate if it were required to satisfy every citizen's religious needs and desires."[11] (Citation and quotation marks omitted.)

Indeed, even under the test established in *Sherbert v Verner*, 374 US 398 (1963), which the United States Supreme Court rejected in *Smith*, whereby governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest, it can hardly be disputed that there is a "compelling governmental interest" in support of the requirement that a witness or party be required to remove veils, face coverings, masks, or any other obscuring garments. It is a "compelling interest" born of our society's commitment to a legal system in which all persons are treated equally. It is a "compelling interest" born of a commitment to a legal system in which the search for truth is paramount, and in which this search may require judges and juries to assess the credibility of parties and witnesses by, among other means, evaluating their expressions and demeanor.[12] It is a "compelling interest" born of a commitment to a system in which appellate courts accord deference to lower courts largely because of the ability of such courts to directly assess witness credibility. And it is a "compelling interest" born of a commitment to a system in which criminal defendants possess the

---

[11] See also *Braunfeld v Brown*, 366 US 599, 606 (1961):

> [W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference. . . . Consequently, it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in . . . disadvantage to some religious sects . . . .

[12] As observed in *United States v Walker*, 772 F2d 1172, 1179 (CA 5, 1985): "The facial expressions of a witness may convey much more to the trier of facts than do the spoken words." (citation and quotation marks omitted.)

constitutional right to a face-to-face confrontation with their accusers. *Coy v Iowa*, 487 US 1012 (1988).[13]

The dissenting justices would allow an exception to our new rule that would provide that a witness could not be precluded from testifying for reasons having to do with a "sincerely held religious belief."[14] What the dissenting justices fail to recognize is that, while freedom of belief is absolute, freedom of conduct is not. *Bowen v Roy*, 476 US 693, 699 (1986) (denying a parent the right to not have her child assigned a social security number over her religious objections). The government is generally not required to conduct its affairs in accordance with the individual beliefs of particular citizens when it possesses some legitimate governmental interest. *Id.* Moreover, as explained earlier, a law does not offend the Free Exercise Clause of the First Amendment if it is neutral towards religion and only incidentally affects religion, as long as it is "generally applicable and otherwise valid." *Smith,* 494 US at 878. Adopting the amendment favored by the dissenting justices would, of course, nullify the entire purpose of the proposed rule by making every witness a law unto himself or herself, commanding that different rules apply to different witnesses, and eroding traditional rules of fair procedure in the courtroom. Their amendment gives only the illusion of addressing the problem that has prompted the new rule.

I am persuaded that adopting a religious exception would be ill-advised because it would effectively require judges to decide what constitutes a "religion," what constitutes the tenets of that faith, which of these tenets are "central" to that faith, and what is the degree of sincerity of the person asserting his or her faith as a justification for disparate treatment.[15] Judges are not theologians or religious scholars, and, if there is anything that

---

[13] See, e.g., *People v Sammons*, 191 Mich App 351 (1991), where a confidential informant was allowed to testify while wearing a mask. The Court of Appeals remanded for a new hearing stating: "Because the masking of the prosecution's chief witness precluded the trial judge from adequately observing the witness' demeanor when testifying, we are constrained to find that the procedure of masking denied defendant a critical aspect of his confrontation rights."

[14] In *Romero v State*, 173 SW3d 502 (Tex. Crim. App, 2005) a key prosecution witness who was fearful of the defendant was allowed to testify wearing dark sunglasses, a baseball cap pulled down over his forehead, and a long-sleeved jacket with its collar turned up and fastened so as to obscure his mouth, jaw, and the lower half of his nose. The court reversed defendant's conviction, holding that his Sixth Amendment right to confrontation had been violated.

[15] See, e.g., *Freeman v Dep't of Highway Safety & Motor Vehicles*, 924 So 2d 48, 52 (Fla App, 2006), in which the Florida Court of Appeals upheld a state law mandating

threatens to inappropriately intertwine church and state, it is not the equal application of our legal rules and procedures, without regard to race, religion, or nationality, but rather it is a system in which lawyers in robes are invested with decision-making responsibility over such threshold questions.

In summary, parties and witnesses are not a law unto themselves, and they cannot unilaterally determine the rules and procedures under which they will participate in our legal process. Instead, there are rules and procedures-- in this instance, having a pedigree of half a millennium or so[16]-- by which our system seeks to discern the truth and thereby to resolve cases and controversies. No individual has a right to require that this country compromise what may well be its crowning achievement, a system in which all stand on equal terms before the law.

KELLY, C.J. *(concurring in part and dissenting in part)*. I would adopt the amendment with the addition of the following language: "Provided, however, that no person shall be precluded from testifying on the basis of clothing worn because of a sincerely held religious belief."

I believe that the amendment as adopted can deny the free exercise of religion guaranteed by both the Michigan and United States constitutions.[17] My proposed addition avoids violations of this fundamental right.

The amendment arose from a small claims action in Michigan's 31st District Court. Ginah Muhammed, the plaintiff, is a practicing Muslim who wears a niqab, a veil that covers her face, except for her eyes. When the case came before the court, the judge told Ms. Muhammed that she must remove her niqab to allow him to evaluate her credibility. She explained that her religion prevented her from following that order, stating: "I don't have a problem with taking my veil off if it's a female judge, so I want to know do you have a female that I could be in front of then I have no problem but

---

that state driver's licenses bear a "full-face" photograph of the license holder, over the objections of a driver who regularly wore a veil over her face for religious reasons. In reaching its decision, the court cited and relied on expert testimony that Islamic law accommodates exceptions to the practice of veiling because of "necessity," including medical necessity, burial identification, and identification for purposes of receiving bequests or inheritances.

[16] Indeed, we are told in *Coy*, 487 US at 1016, that the right of an accused to meet his or her accuser face to face existed under Roman law.

[17] US Const, Am I; Const 1963, art 1, § 4. "The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his [or her] religious belief."

otherwise, I can't follow that order." The judge gave Ms. Muhammed an ultimatum: either remove her veil or her case would be dismissed. She refused to remove the veil and the judge dismissed the case.

Michigan has traditionally afforded strong protection to the free exercise of religion. As this Court has recognized:

> [T]he right to the free exercise of religion was heralded as one of the Bill of Rights' most important achievements. Indeed, Jefferson proclaimed that "[n]o provision in our constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority."[18]

Consistently with the high value placed on the freedom to exercise one's religion, Michigan courts analyze free exercise claims using a strict scrutiny test.[19] "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[20]

It is also clear that the government and litigants have a compelling interest in confronting witnesses and determining their credibility in courts of law. The right of confrontation is fundamental.[21] But the right to the free exercise of religion is no less fundamental. I believe that a judge must not require a plaintiff to choose between removing her niqab or having her case dismissed if a less obtrusive way exists to assess her credibility.

As is evidenced by Ms. Muhammed's litigation, other ways do exist. Her case could have been transferred to a female judge. Or, the male judge assigned to her case could have assessed Ms. Muhammed's credibility without requiring her to remove her niqab.

---

[18] *People v DeJonge (After Remand)*, 442 Mich 266, 278 (1993) (citation omitted).

[19] See, e.g., *McCready v Hoffius*, 459 Mich 131, 143-144 (1998) *vacated and remanded in part on other grounds,* 459 Mich 1235 (1999). Under this test, Michigan courts determine whether: (1) the belief at issue is sincerely held; (2) the belief at issue is religiously motivated; (3) the regulation at issue burdens the exercise of the belief at issue; (4) a compelling state interest justifies the burden at issue; and (5) there is a less obtrusive form of regulation available to the state. *Id.* at 144.

[20] *Wisconsin v Yoder,* 406 US 205, 215 (1972).

[21] US Const, Am VI.

It is not unheard of that a trier of fact in a court proceeding is unable to view the face of a party or witness. The Confrontation Clause is not thereby violated. For example, there are blind jurors. New York courts have explicitly upheld the ability of a blind juror to sit in a jury trial.[22] New York recognized that "a long list of factors besides demeanor [can] be used in evaluating a witness' testimony."[23]

Likewise, several states have enacted statutes that expressly prohibit the exclusion of blind jurors based on their disability.[24] "[A]lthough a blind juror cannot rely on sight, the individual can certainly hear the witness testify, hear the quaver in a voice, listen to the witness clear his or her throat, or analyze the pause between question and answer, then add these sensory impressions to the words spoken and assess the witness's credibility."[25]

Also, there are blind judges. Respected judges in Michigan have been blind, including recently retired Judge Paul S. Teranes of the Wayne Circuit Court. The nation's first blind federal trial judge, the Honorable Richard Conway Casey, faced questions at his confirmation hearings regarding his ability to measure the credibility of a witness he could not see. He responded that visual elements could be distracting. The true measure of credibility, he said, is whether the details in the testimony fit together in a coherent, logical way.[26] The United States Senate did not let his disability prevent his confirmation.

In another example, courts routinely permit the admission of testimony although the speaker never appears in court. The Michigan Rules of Evidence permit statements made at a former trial or deposition to be introduced when the speaker does not testify.[27] Similarly, excited utterances, present sense impressions, statements regarding existing

---

[22] *People v Caldwell,* 159 Misc 2d 190 (1993).

[23] *Id.* at 192-193.

[24] Va Code Ann. § 8.01-337; Tex Gov't § 62.104(a) & (b); SC Code Ann § 14-7-810(3) (1976); Mass Gen Laws Ann, ch 234, § 4 (2000).

[25] Galloway v Superior Court of District of Columbia, 816 F Supp 12, 17 (D, DC 1993).

[26] See Larry Neumeister, *Blind Federal Judge an Inspiration*, (accessed October 28, 2001) <http://www.jwen.com/rp/articles/blindjudge.html>.

[27] MRE 804(b)(1) and (5).

states of mind and statements made for the purpose of medical treatment are all admissible at trial absent the declarant.[28]

Obviously, if the declarant is not present, the declarant cannot be confronted in person; his or her face cannot be viewed. Nonetheless, his or her credibility can be judged. And one can more effectively confront and determine the credibility of a witness wearing a niqab than one can confront and determine the credibility of an absent, faceless deponent.

Moreover, numerous empirical studies support the proposition that viewing a witness's face does not necessarily enhance someone's ability to discern the witness's honesty.[29] In fact, one study found that judges who attempted to determine credibility on the basis of facial expressions were able to detect untruthfulness only 57 percent of the time.[30] People are better able to identify deception by listening to a witness's voice than by observing his or her face.[31]

In any event, our research has disclosed no case in which the Confrontation Clause has been violated because a witness covered his or her face with religious garb. Justice Corrigan in her statement and Prosecutor Baughman in his attached letter address the importance of the Confrontation Clause. But, significantly, neither cites a case involving the freedom of religion. And neither cites a case in which the Confrontation Clause has been held to trump the Free Exercise of Religion Clause.

The law of foreign jurisdictions does not apply in Michigan. Nonetheless, Justice Corrigan cites a foreign jurisdiction that requires the niqab be removed before a judge. It is worth noting that, in certain foreign jurisdictions, women enjoy greater rights under the law than in the jurisdiction mentioned by Justice Corrigan. And in the former jurisdictions, the religious significance of the niqab has received greater respect in courts.

For example, the Judicial Studies Board of Britain released a memorandum to guide judges confronted with a witness who wears a niqab in court. The board

---

[28] See MRE 803(1) through (4).

[29] See, e.g., Wellborn, Demeanor, 76 Cornell L R 1075 (1991) (collecting studies); Blumenthal, A wipe of the hands, a lick of the lips: The validity of demeanor evidence in assessing witness credibility, 72 Neb L R 1157 (1993) (same).

[30] See Ekman & O'Sullivan, *Who Can Catch a Liar?*, 46 Am Psychologist 913, 916 (1991).

[31] See DePaulo et al., *Attentional Determinants of Success at Detecting Deception and Truth,* 8 Personality and Social Psychology Bulletin 273 (1982).

recognized that "there is room for diversity in our system of justice and there should be a willingness to accommodate different practices and approaches to religious cultural observances."[32] The board explained that it should not be assumed "that it isinappropriate for a woman to give evidence in court wearing the full veil."[33] In New Zealand, judges are authorized to allow a witness to give evidence through alternative means that do not interfere with "the linguistic or cultural background or religious beliefs of the witness."[34]

The amendment that the Court has adopted has been opposed by the American Civil Liberties Union of Michigan, the Michigan Civil Rights Commission, and a consortium of religious, domestic violence, and cultural diversity organizations. I agree with them that a judge should not force a woman who wears a niqab because of a sincerely held religious belief to remove it before testifying in court. I agree that such a practice is unnecessary in order to protect the right of confrontation given that less obtrusive means exist to satisfy that right.

I would support the proposed amendment if it included the exception for sincerely held religious beliefs that I have proposed.

HATHAWAY, J., concurs with KELLY, C.J.

---

[32] Judicial Studies Board, Equal Treatment Advisory Committee, *Guidance on Wearing of the Veil or Niqab in Court,* Ch 3.3 at 3, 6.

[33] Id.

[34] *Evidence Act 2006,* 2006 PA 69, § 103 (NZ).

Staff Comment: This amendment explicitly states that a judge shall establish reasonable standards regarding the appearance of parties and witnesses to evaluate the demeanor of those individuals and to ensure accurate identification.

The staff comment is not an authoritative construction by the Court.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

August 25, 2009

Clerk

May 25, 2009

Mr. Corbin Davis
Clerk
Michigan Supreme Court

Re: ADM File No. 2007-13.

Dear Clerk Davis:

Below are my comments with respective to Administrative File 2007-13. The comment period has closed, and the public hearing has been held; I regret my tardiness with regard to this proposal. But I was surprised to see those who, by their own statement, are "strong advocate[s] of the Confrontation Clause and the rights of criminal defendants" (comments of ACLU of Michigan) take the view that allowing a witness to testify in a criminal prosecution with his or her face covered would not violate the confrontation clause rights of a criminal defendant. There is little question, it seems to me, that attorneys representing defendants in criminal prosecutions will take a different view (indeed, it seems to me they are virtually ethically so required). Because that view has not been expressed to the court, I make the following comments. Though I have views with regard to this subject with civil cases, I limit myself here to criminal cases.

The Supreme Court Cases

A. Coy v Iowa[1]

The defendant was charged with sexually assaulting two 13-year-old girls. As allowed by statute, the trial judge permitted these witnesses to testify at trial behind a screen, lit so that they could not see the defendant at all, and he could dimly make them out. The Supreme Court said that "We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact" and that "[t]he Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who

[1] 487 U.S. 1012,108 S.Ct. 2798,101 L.Ed.2d 857 (1988)

testify against him, and the right to conduct cross-examination." The use of the screen was held unconstitutional on the facts of the case. But left open was "whether any exceptions exist."

B. Maryland v Craig[2]

The defendant was prosecuted for a sexual assault on a 6-year-old child. Statute permitted the taking of the testimony by way of a one-way closed circuit television feed, on a finding that this was necessary to prevent trauma to the child. While the defendant could see the face of the witness, as could the jury, the witness-victim would not see the defendant. This process was upheld in a 5-4 opinion. The Court concluded that though the witness could not see the defendant as she testified, the procedure was permissible—on the proper statutory showing—because it "preserve[d] *all of the other elements* of the confrontation right: The child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the *judge, jury, and defendant are able to view (albeit by video monitor) the demeanor* (and body) of the witness as he or she testifies.. . .the presence of these other elements of confrontation-oath, cross-examination, and *observation of the witness' demeanor*-adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony" (emphasis supplied). Emphasized, then, was that both jury and defendant could see the face of the witness.[3] Given current Confrontation Clause developments, I find it doubtful that even this exception—permitting the witness to avoid "face-to-face" confrontation with the defendant so long as both the defendant and jury may observe the face of the witness—would survive today.

---

[2] 497 U.S. 836,110 S.Ct. 3157,111 L.Ed.2d 666 (1990).

[3] And Justice Scalia, for the dissenters, found this inadequate:

> The reasoning is as follows: The Confrontation Clause guarantees not only what it explicitly provides for-"face-to-face" confrontation-but also implied and collateral rights such as cross-examination, oath, and observation of demeanor (TRUE); the purpose of this entire cluster of rights is to ensure the reliability of evidence (TRUE); the Maryland procedure preserves the implied and collateral rights (TRUE), which adequately ensure the reliability of evidence (perhaps TRUE); therefore the Confrontation Clause is not violated by denying what it explicitly provides for-"face-to-face" confrontation (unquestionably FALSE). This reasoning abstracts from the right to its purposes, and then eliminates the right. It is wrong because the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was "face-to-face" confrontation.

497 U.S. 836, 862, 110 S.Ct. 3157, 3172.

The "Disguise" Cases

Several cases have considered the confrontation clause implications when witnesses are allowed to obscure their faces from the view of the defendant and the jury (which was not the case—something emphasized by the Court—in *Craig*). In *Romero v State*[4] the witness wore dark sunglasses, a baseball cap pulled down over his forehead, and a long-sleeved jacket with its collar turned up and fastened so as to obscure his mouth, jaw, and the lower half of his nose—in essence, as the court put it, the effect was "to hide almost all of his face from view." The witness insisted on this arrangement, refusing to otherwise testify, even if it meant his jailing, because he was afraid of the defendant, given what he had seen him do during the crime (the witness was not the victim, but observed an exchange of gunfire between the defendant and a security guard at a nightclub). The court found *Craig* distinguishable because the jury and the defendant here were unable to assess the demeanor of the witness, something *Craig* had emphasized was present in that case. To hold otherwise, said the court is "to remove the 'face' from "face-to-face confrontation."

Another "sunglasses/disguise" case is *Commonwealth v Lynch*.[5] Defendant claimed a prosecution witness had worn sunglasses during his testimony—there was no other evidence of any part of the witness's face being covered—but there had been no objection at trial, and defendant's trial counsel did not remember sunglasses at all, while his co-counsel believed the witness wore tinted glasses that were not very dark. The prosecutor did not believe the witness wore sunglasses during testimony, and the court found that defendant's claim foundered on the facts. But even in the event the witness had worn sunglasses, the court concluded that the wearing of dark glasses "does not prevent exposure of a witness's face." So long as the face of the witness was visible, then, the court found no confrontation clause violation.

In *Morales v Artuz*[6] a principal witness, who was sighted, was permitted to testify wearing dark sunglasses ("you couldn't see through them" to see the eyes of the witness) because of her fear. The court agreed that the right of confrontation was "impaired" to some extent—"to the extent that the right assures an opportunity for the defendant and especially the jurors to see the witness's eyes in order to consider her demeanor as an aid to assessing her credibility, some impairment occurred." But the case was on federal habeas review, and the standard to be applied was whether the state courts had "unreasonably applied settled federal law as determined by the United States Supreme Court" in upholding the testimony, and the court did not find that standard met and so affirmed the denial of the writ.

---

[4] 173 SW 3d 502 (2005).

[5] 789 NE2d 1052 (Mass, 2003).

[6] 281 F3d 55 (CA 2, 2002).

Conclusion

Though the law is not clear, the strong trend is toward strengthening not weakening confrontation clause protections. And even *Craig*, which allowed the witness to avoid face-to-face confrontation with the defendant, did so only on a showing of need, *and* because both the defendant and the jury could see the face of the witness. The "disguise" and sunglasses cases tend to turn on whether the remainder of the witness's face is open to view (and I suspect the use of dark sunglasses by a sighted witness without some medical necessity may, after *Crawford*, receive closer scrutiny). I do not think significant obstruction of the visage of a witness in a criminal case would survive confrontation-clause scrutiny, and I hope it is beyond argument that prosecution witnesses and defense witnesses should not be treated differently in this regard. It is thus vitally important that the court make it clear that a witness in a criminal case must testify without significant obscuring of the face. Again, while I have my own views with regard to civil cases, I will leave that question alone.

The views laid out here are my own and are not intended to represent the views of my Office.

Sincerely,

Timothy A. Baughman