

COURT OF APPEALS OF NEW YORK

People v. Wrotten¹
(decided December 15, 2009)

Juwanna Wrotten was charged with first degree assault and two counts of first degree robbery.² Since the complainant was unable to travel to New York to testify due to his age and health, the People requested the use of two-way video conferencing.³ The court granted the request, and Wrotten was later convicted based upon this testimony.⁴ The appellate division reversed her conviction based on the trial court's abuse of authority in allowing such video testimony.⁵ In addition to that issue, the New York Court of Appeals faced the issue of whether the use of two-way video conferencing violated Juwanna Wrotten's Confrontation Clause rights⁶ under the United States and New York Constitutions.⁷ The court reversed the appellate division, reinstated the conviction, and held that the use of live two-way video testimony was constitutional as the trial court had the inherent authority to use such a procedure when it was " 'necessary to further an important public policy' and 'the reliability of the testimony [was] otherwise assured.' "⁸

In June 2003, Juwanna Wrotten, acting as a home health aide

¹ (*Wrotten III*), 923 N.E.2d 1099 (N.Y. 2009).

² *Id.* at 1100.

³ *Id.* at 1101. Prior to the trial, the People asked the court to grant a conditional examination of the complainant in California where he was presently living. However, this was unable to occur because Criminal Procedure Law (CPL) Article 660 required the examination to take place in New York. *Id.* at 1100-01.

⁴ *Id.* at 1101.

⁵ *Wrotten III*, 923 N.E.2d at 1101 (citing *People v. Wrotten (Wrotten II)*, 871 N.Y.S.2d 28, 44 (App. Div. 1st Dep't 2008)).

⁶ U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."); N.Y. CONST. art. I, § 6 ("In any trial in any court whatever the party accused shall be . . . confronted with the witnesses against him or her.").

⁷ *Wrotten III*, 923 N.E.2d at 1103.

⁸ *Id.* at 1102-03 (quoting *Maryland v. Craig*, 497 U.S. 836, 850 (1990)).

for the complainant's wife, was assisting the elderly man in preparing food to take to his wife who had just begun living in a nursing home.⁹ At eighty-three years old, the man had difficulty walking and a history of coronary heart disease.¹⁰ According to the complainant, while he was preparing the food, Wrotten came up from behind him, hit him in the head with a hammer, and forced him to give her money.¹¹ With no one else around, it was the man's word alone against the home health aide's. Wrotten, however, claimed she hit him with "something" only after he grabbed her breast.¹² She denied asking for or receiving money.¹³ The man was left with head wounds and broken fingers.¹⁴

Due to the incident, he moved to California, which was where his children resided.¹⁵ Since he was unable to travel to New York to testify, the People requested the use of two-way video conferencing to allow the complainant to testify from California.¹⁶ The trial court granted the request with the requirements that the conferencing occur live at the trial and that they show the complainant's inability to travel to New York.¹⁷ In the subsequent hearing regarding his inability to travel, the trial court ruled that the complainant's weakness, problems walking, and history of coronary heart disease not only rendered him unable to travel to New York, but would further endanger his health if he was required to do so.¹⁸ At trial, the complainant testified in a courtroom in California using the two-way video.¹⁹ The complainant was able to see the defendant, the defendant's counsel, the prosecutor, the judge, and the jury on the screen.²⁰ In addition, the complainant and his facial expressions were "very clearly" visible on the screen live during the trial.²¹ Subsequently, Juwana Wrotten

⁹ *Id.* at 1100.

¹⁰ *Id.* at 1100-01.

¹¹ *Id.* at 1100.

¹² *Wrotten III*, 923 N.E.2d at 1100.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 1101.

¹⁷ *Wrotten III*, 923 N.E.2d at 1101.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

was convicted of assault but acquitted of the robbery charges.²² On appeal, the appellate division reversed her conviction, finding that the trial court lacked the express authority to allow the complainant to testify by two-way video, thus avoiding the Confrontation Clause issue.²³

On appeal, the New York Court of Appeals held that the trial court's exercise of authority allowing video testimony was permissible²⁴ and that such use did not violate Juwana Wrotten's Confrontation Clause rights under either the United States or New York Constitutions.²⁵ After establishing that the trial court had the authority to allow the use of two-way video testimony, the court needed to determine whether the exercise of this authority given the facts of the case was constitutionally permissible.²⁶ To determine whether use of the two-way video was permissible under the Federal Constitution, the court relied on the United States Supreme Court's decision in *Maryland v. Craig*.²⁷ In *Craig*, the Court stated 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."²⁸ The New York Court of Appeals applied the standard set forth in *Craig* to the facts in *Wrotten* and found that a necessary public policy was present and that the reliability of the testimony was assured.²⁹

²² *Wrotten III*, 923 N.E.2d at 1101.

²³ *Id.* (citing *Wrotten II*, 871 N.Y.S.2d at 44).

²⁴ *Id.* at 1102. In analyzing whether or not the trial court had the authority to allow the use of two-way video testimony, the New York Court of Appeals looked to the New York Constitution and the Judiciary Law. The court found that " 'the Constitution permits the courts latitude to adopt procedures consistent with general practice as provided by statute,' " and section 2-b of the Judiciary Law vests courts with the authority to use "innovative procedures where 'necessary to carry into effect the powers and jurisdiction possessed by [the court].'" *Id.* at 1101 (quoting *People v. Ricardo B.*, 535 N.E.2d 1336, 1338 (N.Y. 1989)).

²⁵ *Id.* at 1102.

²⁶ *Wrotten III*, 923 N.E.2d at 1102.

²⁷ *Id.* (citing *Craig*, 497 U.S. at 850).

²⁸ *Craig*, 497 U.S. at 850 (citing *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988)).

²⁹ *Wrotten III*, 923 N.E.2d at 1103. Although the New York Court of Appeals remanded the case back to the appellate division to determine whether the findings of fact were supported by clear and convincing evidence, the court stated that if they were, then the necessity requirement was satisfied. *Id.* The public policy raised by the complainant's physical condition meets the necessary public policy required by the standard. *Id.* On remand, the appellate division held that the supreme court did not err in finding that the complainant's inability to travel to the courthouse without putting his health in danger was proven by clear and

The New York Court of Appeals first looked to the Court's opinion in *Craig* to determine how to measure whether the reliability of the testimony was assured where the witness was absent from the courtroom.³⁰ *Craig* held that the reliability of the testimony is assured by preserving the "traditional indicia of reliability": "testimony under oath, the opportunity for contemporaneous cross-examination, and the opportunity for the judge, jury, and defendant to view the witness's demeanor as he or she testifies."³¹ In applying this test to the facts in *Wrotten*, the court found that the two-way video preserved all three elements essential to assuring the reliability of the testimony.³² The complainant testified under oath, was contemporaneously cross-examined, and was able to be viewed clearly by the judge, jury, and defendant.³³

Without Supreme Court precedent directly stating whether the situation of a "key witness too ill to appear in court" raised an important public policy, the New York Court of Appeals interpreted the lack of clarification to mean that such a finding was possible and supported its holding by referring to other federal and state courts that have permitted video testimony under the same circumstances.³⁴ The court held that "the public policy of justly resolving criminal cases while at the same time protecting the well-being of a witness" was an important public policy that necessitates the use of two-way video testimony.³⁵ However, the court limited its holding to situations "where a key witness cannot physically travel to court in New York and where, as here, defendant's confrontation rights have been minimally impaired."³⁶ While making its determination, the court acknowledged that two-way video conferencing was not the same as

convincing evidence. *People v. Wrotten (Wrotten I)*, 901 N.Y.S.2d 265, 265 (App. Div. 1st Dep't 2010). The appellate division also held that the complainant was a key witness and therefore met the requirements set forth by the New York Court of Appeals. *Id.* at 266. The United States Supreme Court denied certiorari due to procedural difficulties based on the interlocutory posture of the case. *Wrotten v. New York (Wrotten IV)*, 130 S. Ct. 2520, 2520 (2010).

³⁰ See *Wrotten III*, 923 N.E.2d at 1102.

³¹ *Id.* at 1102-03 (citing *Craig*, 497 U.S. at 851).

³² *Id.* at 1103.

³³ See *id.*

³⁴ *Id.*

³⁵ *Wrotten III*, 923 N.E.2d at 1103.

³⁶ *Id.* (emphasis added).

giving face-to-face testimony.³⁷ The court further limited its holding by saying that “the decision to excuse a witness’s presence in the courtroom should be weighed carefully,” and used only where there is a “case-specific finding of necessity.”³⁸ Finding both assurance of reliable testimony and the necessity to further an important public policy, the New York Court of Appeals held that the trial court’s decision to allow the use of two-way video testimony satisfied the Federal Confrontation Clause.³⁹

The right to confrontation applies not only in federal proceedings, but state proceedings as well.⁴⁰ In determining whether Juwana Wrotten’s Confrontation Clause rights were violated under the New York Constitution, the New York Court of Appeals briefly mentioned its decision in *People v. Cintron*.⁴¹ In *Cintron*, the court held that use of closed-circuit television does not violate the New York Constitution where “(1) an appropriate individualized showing of necessity is made and (2) the infringement on defendant’s confrontation rights is kept to a minimum.”⁴² Since the federal and state standards have been treated as the same,⁴³ although worded slightly differently, the New York Court of Appeals avoided a separate state analysis and permitted the federal analysis to satisfy both Confrontation Clauses.⁴⁴

Disagreeing with the majority’s reasoning, Justice Smith took the position that Juwana Wrotten’s rights were violated under both

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 1100.

⁴⁰ *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (holding that the Confrontation Clause applies to the states through the Due Process Clause of the Fourteenth Amendment).

⁴¹ 551 N.E.2d 561 (N.Y. 1990).

⁴² *Id.* at 567 (forbidding the use of two-way video conferencing to allow a child victim/witness in a sexual abuse case to testify without being in the courtroom due to an insufficient showing of vulnerability on the part of the child).

⁴³ The difference in the wording of the state standard was not an intentional departure from the federal standard, but rather due to the fact that *Cintron* was decided five months before the federal standard was announced in *Craig*. The state standard is used interchangeably with that of the federal. See *Wrotten III*, 923 N.E.2d at 1106-07 (Smith J., dissenting).

That conclusion does not resolve the case, because we held in *People v. Cintron* and the United States Supreme Court held in *Maryland v. Craig*, that the right of face to face confrontation is not absolute, and may be denied where “an appropriate individualized showing of necessity is made”—or, as the Supreme Court put it, where “denial of such confrontation is necessary to further an important public policy.”

Id. (internal citations omitted).

⁴⁴ *Id.* at 1102 (majority opinion).

the Federal and State Constitutions.⁴⁵ The dissent argued that the right to confrontation encompassed one's right "to meet one's accuser face to face," with such face-to-face confrontation bringing with it a psychological effect that is likely to deter the witness from making false accusations.⁴⁶ Justice Smith stated, "The assumption underlying the constitutional right of confrontation is that a witness brought into the presence of the accused will be less likely to swear to a false accusation, or to do so convincingly."⁴⁷

According to Justice Smith, the necessity and public policy involved in protecting vulnerable child witnesses who have been sexually assaulted and have no other way to avoid the trauma was "far more compelling" than the necessity in protecting the health of an elderly witness who did have another way to avoid the harm.⁴⁸ In cases regarding children testifying about sexual abuse, the harm is directly caused by the face-to-face confrontation making it reasonable to remove the face-to-face aspect.⁴⁹ However, the harm attempting to be avoided in *Wrotten* was not directly caused by the face-to-face aspect.⁵⁰ The face-to-face aspect could have been maintained by the use of alternative options, such as bringing the accused to California to confront the complainant.⁵¹ Although this is a valid argument, this alternative was not available under New York's statutes.⁵²

The right to confrontation is an "essential and fundamental" part of a fair trial.⁵³ The Supreme Court has held that the right to

⁴⁵ See *id.* at 1106 (Smith, J., dissenting). Justice Jones also dissented. In his dissenting opinion, he avoided the constitutional issues and based his argument on the fact that there was nothing that expressly authorized the court to use two-way video conferencing. *Id.* at 1103 (Jones, J., dissenting). By specifically articulating the requirements to use the technology in child sexual abuse cases, the legislature demonstrated its intent to not have it apply in circumstances not listed. *Wrotten III*, 923 N.E.2d at 1104.

⁴⁶ *Id.* at 1106 (Smith, J., dissenting) (citing *Coy*, 487 U.S. at 1016, 1019).

⁴⁷ *Id.* (citing *Coy*, 487 U.S. at 1019).

⁴⁸ *Id.* at 1107.

⁴⁹ *Id.*

⁵⁰ See *Wrotten III*, 923 N.E.2d at 1107.

⁵¹ *Id.*

⁵² *Id.* at 1100-01 (majority opinion) ("CPL article 660 requires that the examination be conducted in New York State and complainant was unable to travel.").

⁵³ *Pointer*, 380 U.S. at 405. The importance of the Sixth Amendment's Confrontation Clause was articulately explained by Justice Black, when he stated: "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Id.*

confrontation is a “fundamental right,” that the right applies to the states through the Due Process Clause of the Fourteenth Amendment,⁵⁴ and that the “main and essential purpose” of the Confrontation Clause is cross-examination.⁵⁵ In 1988, in *Coy v. Iowa*,⁵⁶ the Court held that “the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.”⁵⁷ However, two years later, in *Craig*, the Court held that the right to confrontation was not absolute.⁵⁸ In *Craig*, the Court recognized an exception to the face-to-face requirement for a child victim in a sexual abuse case and other child witnesses allegedly abused by the defendant that would suffer “trauma that would be caused by testifying in the physical presence of the defendant.”⁵⁹ It reasoned that previous precedent merely “ ‘reflect[ed] a preference for face-to-face confrontation at trial,’⁶⁰ [which must yield to] . . . ‘public policy and the necessities of the [specific] case.’ ”⁶¹ The Confrontation Clause can be satisfied without face-to-face confrontation when it is “necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.”⁶² In *Craig*, the Court found that the one-way video assured the reliability of the testimony by preserving the traditional indicia of reliability previously mentioned.⁶³ The children were capable of testifying, testified under oath, were contemporaneously cross-examined, “and were able to be [viewed] by the judge, jury, and defendant [while] they testified.”⁶⁴ The Court also concluded that “a State’s interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant’s right to face his or her accusers in court.”⁶⁵ The Court limited its holding by

⁵⁴ *Id.* at 403.

⁵⁵ *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) (quoting 5 J. WIGMORE, EVIDENCE § 1395, p. 123 (3d ed. 1940)).

⁵⁶ 487 U.S. 1012.

⁵⁷ *Id.* at 1016 (citing *Kentucky v. Stincer*, 482 U.S. 730, 749-50 (1987) (Marshall, J., dissenting)).

⁵⁸ *Craig*, 497 U.S. at 844.

⁵⁹ *Id.* at 857.

⁶⁰ *Id.* at 849 (quoting *Ohio v. Roberts*, 488 U.S. 56, 63 (1980)).

⁶¹ *Id.* (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)).

⁶² *Id.* at 850 (citing *Coy*, 487 U.S. at 1021).

⁶³ *Craig*, 497 U.S. at 851.

⁶⁴ *Id.* at 857.

⁶⁵ *Id.* at 853.

requiring that the procedure be “necessary to protect the welfare of the particular child witness who seeks to testify” and that “the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant.”⁶⁶

An exception to in-person confrontation has also been applied, on multiple occasions, where a key witness was too sick to travel.⁶⁷ In *United States v. Gigante*,⁶⁸ the Second Circuit held that the defendant’s confrontation rights were not violated when the trial court allowed the key witness, who was in “the final stages of an inoperable, fatal cancer,” to testify using two-way, closed circuit televised testimony.⁶⁹ After the government requested the use of closed-circuit television for the witness to testify, the trial court “held a hearing to determine whether [the witness] was [physically] [un]able to travel to New York.”⁷⁰ Expert testimony showed that it would be unsafe for him to travel in regards to his health.⁷¹ Although an oncologist for the defendant testified that “it would not be life-threatening” for the witness to travel, the trial court nevertheless held in favor of the government.⁷² In rendering its decision, the court showed that the reliability of the testimony was assured by the fact that the witness still testified under oath, was cross-examined, was viewed through the television by all courtroom participants so that his demeanor could be observed, and was under the eye of the defendant himself.⁷³ The court did not put forth an important public policy furthering the use of the video in *Gigante*, but rather distinguished *Gigante* from *Craig*.⁷⁴ According to the court, the *Craig* standard, requiring reliability and necessity, did not apply because it was created to apply to

⁶⁶ *Id.* at 855-56 (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-09 (1982)).

⁶⁷ *Horn v. Quarterman*, 508 F.3d 306, 310 (5th Cir. 2007) (permitting use of two-way testimony by prosecution’s witness who was in the terminal stages of cancer); *United States v. Benson*, 79 Fed. Appx. 813, 821 (6th Cir. 2003) (permitting use of two-way testimony by an elderly witness who testified to being underweight and fatigued after recently undergoing surgery); *United States v. Gigante*, 166 F.3d 75, 79 (2d Cir. 1999) (permitting use of two-way testimony by a crucial witness who was in the terminal stages of cancer).

⁶⁸ 166 F.3d 75.

⁶⁹ *Id.* at 79.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 79-80.

⁷³ *Gigante*, 166 F.3d at 80.

⁷⁴ *Id.* at 80-81.

the use of 'one-way' closed circuit television in which the witness could not view the defendant.⁷⁵ In *Gigante*, the means used for the witness to testify was 'two-way' closed circuit television, which requires the witness to view the defendant.⁷⁶ The two-way system preserved the face-to-face confrontation, since the witness and defendant were still looking at each other's face as the witness testified.⁷⁷ Lastly, the court acknowledged that deposing the witness was an available option but agreed with the district court that " 'contemporaneous testimony via closed circuit televising affords greater protection of . . . confrontation rights than would a deposition,' " because the transcript alone would not have allowed the witness' demeanor to be observed.⁷⁸

The Southern District Court of New York recently applied this established standard to a unique factual scenario in *United States v. Banki*.⁷⁹ In *Banki*, the defendant was charged with violating the International Emergency Economic Powers Act, by illegally operating a value transfer system in which he and other co-conspirators transferred money from the United States to Iran.⁸⁰ In his defense, Banki alleged that the money he received from Iran was merely a gift from his relatives to purchase an apartment in New York City.⁸¹ Banki sought to introduce testimony from his relatives presently living in Iran and the family's broker who arranged the transfer.⁸² Although some of his relatives were United States citizens, they were reluctant to come back to the United States to testify fearing they too would be arrested as co-conspirators.⁸³ Banki tried to arrange an agreement to have the witnesses come to New York if they could trust that they would not be arrested, but the government refused to enter such an agreement.⁸⁴ Banki then requested that the proposed witnesses be allowed to testify at trial from Iran through the use of

⁷⁵ *Id.* at 81.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Gigante*, 166 F.3d at 81 (quoting *United States v. Gigante*, 971 F. Supp. 755, 759 (E.D.N.Y. 1997)).

⁷⁹ No. 10CR08 (JFK), 2010 WL 1063453, at *1 (S.D.N.Y. Mar. 23, 2010).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Banki*, 2010 WL 1063453, at *1.

live video conferencing.⁸⁵ In making its decision, the court acknowledged that this situation differed from prevailing precedent, in that the defendant, not the government, was requesting use of the video conferencing.⁸⁶ One's Confrontation Clause rights are not implicated when the defendant, as opposed to the government, is making the request.⁸⁷

Nevertheless, the court applied the standard from *Craig* and *Gigante*, because the court lacked directly applicable precedent for such a request by a defendant and the issue presented similar considerations regarding the integrity of the proceedings.⁸⁸ In applying the standard, the court denied the defendant's request because the second element—that the reliability of the testimony be otherwise assured—would not be satisfied by using video testimony in that case.⁸⁹ Although the witnesses would be under oath, the court could not ensure the reliability of the testimony, as the government could not prosecute them for perjury because they were beyond the reach of the United States government.⁹⁰ Although the defendant's Confrontation Clause rights were not implicated in *Banki*, the case raised the point that the use of video testimony can benefit both the prosecution and the defense.

The law regarding the Confrontation Clause is the same under the New York Constitution and the United States Constitution.⁹¹ The

⁸⁵ *Id.*

⁸⁶ *Id.* at *2.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Banki*, 2010 WL 1063453, at *2.

⁹⁰ *Id.*

⁹¹ While the New York approach explicitly states that an individualized showing is required and the defendant's confrontation rights must be minimally infringed, both of these requirements are addressed in *Craig* as being part of the federal approach. See *Craig*, 497 U.S. at 855 (stating that the necessity must be specific to the witness in particular); *id.* at 845-46 (noting that the indicia of reliability, as explicitly required in the federal approach, are what make up a defendant's confrontation rights). While the federal approach explicitly states that there must be an important public policy and the testimony's reliability must be assured, both of these requirements are addressed in *Cintron* as being part of the New York approach. See *Cintron*, 551 N.E.2d at 567 (noting that the standard is meant to apply when "a defendant's rights of confrontation 'must occasionally give way to considerations of public policy' " (quoting *Mattox*, 156 U.S. at 243)); *id.* at 567-69 (noting that the New York requirement that a defendant's confrontation rights be minimally infringed is guaranteed by the indicia of reliability which assure the reliability of the testimony); see also *Wrotten III*, 923 N.E.2d at 1106 (Smith, J. dissenting) ("I assume here that the content of the state and federal rights is the same; I know of no authority holding otherwise.").

New York Court of Appeals allows for “the use of closed-circuit television technology where: (1) an appropriate individualized showing of necessity is made and (2) the infringement on defendant’s confrontation rights is kept to a minimum.”⁹² Although worded differently, this approach is equivalent to the federal approach, allowing the absence of face to face confrontation when “necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.”⁹³ The test simply comes down to necessity and reliability.

Similar to the federal precedent, New York State courts have also long acknowledged the importance of one’s right to confrontation. In 1896, in *People v. Kraft*,⁹⁴ the New York Court of Appeals stated, “The power of cross-examination is quite as essential, in the process of eliciting the truth, as the obligation of an oath; and where the life or the liberty of the defendant is at stake the absence of the opportunity for cross-examination is a serious deprivation”⁹⁵

In *Cintron*, the trial court permitted the use of two-way video conferencing to allow a child victim in a child sexual abuse case to testify without being in the courtroom.⁹⁶ Although the court ultimately concluded that the trial court erred in allowing the procedure in that specific case, on the basis that there was insufficient evidence of vulnerability on the part of the child, the court held that use of closed-circuit televised testimony is permitted where “(1) an appropriate individualized showing of necessity is made and (2) the infringement on defendant’s confrontation rights is kept to a minimum.”⁹⁷ According to the court in *Cintron*, the “face-to-face confrontation with the defendant is not an absolute requirement under either the Federal or State Constitution.”⁹⁸ The court believed necessity existed if face-to-face contact with the defendant would lead to “*severe mental or emotional harm*” to the witness.⁹⁹ Having different facts but similar reasoning, the court in *Wrotten* believed necessity existed because forcing the witness to relocate would lead to *se-*

⁹² *Cintron*, 551 N.E.2d at 567.

⁹³ *Craig*, 497 U.S. at 850 (quoting *Roberts*, 488 U.S. at 64).

⁹⁴ 43 N.E. 80 (N.Y. 1896).

⁹⁵ *Id.* at 80-81.

⁹⁶ *Cintron*, 551 N.E.2d at 563.

⁹⁷ *Id.* at 567.

⁹⁸ *Id.*

⁹⁹ *Id.* at 564 (emphasis added).

vere physical harm to the witness based on his deteriorating health.¹⁰⁰

In *People v. Henderson*,¹⁰¹ which was decided three months after *Cintron*, the court held that the first element—an individualized showing of necessity—was not satisfied when the trial court allowed two sexually abused children to testify using two-way closed-circuit television.¹⁰² The court in *Henderson* held that the difficulty for sexually abused children to testify in the same room as their abuser was not enough to rise to the level of exceptional circumstances that warranted the use of the two-way video.¹⁰³ To rise to this level, it must be shown that the children would suffer “further and severe mental or emotional harm” (in addition to the harm they already have from the abuse) by being denied the ability to use the two-way closed-circuit television.¹⁰⁴ Finding it to be a “very frightening experience” is not enough.¹⁰⁵ Although the court acknowledged the trauma experienced by children who are sexually abused, the court forcefully stated that the “inestimable importance of face-to-face confrontation” should make the use of such technology the “exception, and not the rule.”¹⁰⁶

While the precedent on the use of video conferencing in child sexual abuse cases is abundant,¹⁰⁷ the issue of using video conferencing in other circumstances has arisen more recently for state courts. In 2006, in *In re A. Sawyer*,¹⁰⁸ the Supreme Court of Oneida County allowed a physician to use video conferencing to testify.¹⁰⁹ The court supported its decision by noting that “[p]hysicians’ schedules are hectic, live appearances by them are costly to the parties, the physician, and the health care system overall.”¹¹⁰ Similar to *Gigante*, the court also acknowledged the available option of using a video deposi-

¹⁰⁰ See *Wrotten III*, 923 N.E.2d at 1101.

¹⁰¹ 554 N.Y.S.2d 924 (App. Div. 2d Dep’t 1990).

¹⁰² *Id.* at 927.

¹⁰³ *Id.* at 928.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (citing *Wildermuth v. State*, 530 A.2d 275, 289 (Md. 1987) (finding that the psychologist’s testimony that it would be very frightening for the child to testify in the same room as the defendant was not enough to permit the child to testify in a separate room)).

¹⁰⁶ *Henderson*, 554 N.Y.S.2d at 929.

¹⁰⁷ Cathleen J. Cinella, *Compromising the Sixth Amendment Right to Confrontation—United States v. Gigante*, 32 SUFFOLK U. L. REV. 135, 159 (1998) (noting that courts frequently use the Confrontation Clause exception in child abuse cases).

¹⁰⁸ 823 N.Y.S.2d 641 (Sup. Ct. 2006).

¹⁰⁹ *Id.* at 646.

¹¹⁰ *Id.* at 645.

tion.¹¹¹ The court concluded that use of video conferencing was superior in that it allowed the witness to testify “in real time” allowing the judge the ability to immediately rule on objections.¹¹²

The New York Court of Appeal’s decision in *Wrotten* was consistent with both federal and state precedent. Instead of changing the law, the court merely extended when closed circuit technology could be used. Regardless of the number of cases consistent with the approach taken in *Wrotten*, opposition exists to extending the circumstances in which closed circuit television can be used.¹¹³ While some recognize the benefits of using this new technology,¹¹⁴ others stand by the strict belief that the Confrontation Clause “guarantees a defendant the right to meet his or her accusers face-to-face before the trier of fact.”¹¹⁵ In *Henderson*, the court stood by the position that the right to confront one’s accuser face-to-face “ ‘may confound and undo the false accuser, or reveal the child coached by a malevolent adult.’ ”¹¹⁶

Contrary to this position, courts should follow the *Wrotten* decision and allow two-way closed circuit television to be used in cases where a key witness is physically unable to travel due to health concerns. First, the Confrontation Clause should be interpreted in

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See *Stoner v. Sowders*, 997 F.2d 209, 213 (6th Cir. 1993). Judge Meritt emphasized the importance of a witness testifying first hand, face-to-face with the accused by stating:

In the most important affairs of life, people approach each other in person, and television is no substitute for direct personal contact. Video tape is still a picture, not a life, and it does not come within the rule of the confrontation clause which insists on real life where possible, not simply a close approximation.

Id.

¹¹⁴ Hadley Perry, *Virtually Face-to-Face: The Confrontation Clause and the Use of Two-Way Video Testimony*, 13 ROGER WILLIAMS U. L. REV. 565, 592-93 (2008) (stating that “[t]he procedure is convenient, cost-effective, efficient, and comports with modern notions of globalization and technological advancements,” “it provides a better alternative for obtaining foreign witness testimony,” and that even “studies have found that jurors respond the same to live witnesses as those testifying via video conference”).

¹¹⁵ *Henderson*, 554 N.Y.S.2d at 927; see also *United States v. Yates*, 438 F.3d 1307, 1315 (11th Cir. 2006) (“The simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation.”).

¹¹⁶ *Henderson*, 554 N.Y.S.2d at 927 (quoting *Coy*, 487 U.S. at 1020). *Contra Craig*, 497 U.S. at 851 (arguing that the traditional indicia of reliability permit a defendant to “ ‘confound and undo the false accuser, or reveal the child coached by a malevolent adult’ ” (quoting *Coy*, 487 U.S. at 1020)).

light of modern technology. As long as the defendant's right to cross-examine his accuser and the indicia of reliable testimony are preserved, courts should embrace the benefits that such technology can bring. Second, the use of such technology in circumstances where the witness is the sole witness to the crime, as was the case in *Wrotten*, resolves similar problems as those that arise in child abuse cases. Lastly, use of such technology is consistent with the true purpose of the Confrontation Clause and does not detract from the truth-seeking purpose of the trial process.

First, the Confrontation Clause should be interpreted in light of modern technology. As declared in *People v. Algarin*,¹¹⁷ the Confrontation Clause creates a “ ‘secured right of cross-examination’ ” and only a “ ‘preference of face-to-face confrontation.’ ”¹¹⁸ “[T]he confrontation guaranteed by the clause is not necessarily one in a courtroom.”¹¹⁹ Before the availability of television, confrontation required a face-to-face meeting.¹²⁰ However, in modern times, this language has been said to refer to a right of cross-examination rather than a right to a physical face-to-face meeting.¹²¹ The lack of clarity in the clause has been attributed to the “inability to foresee technological developments permitting cross-examination and confrontation without physical presence.”¹²² This belief, that the right to confrontation is actually meant to be a right to cross-examination, has been acknowledged by the United States Supreme Court itself: “[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination”¹²³

¹¹⁷ 498 N.Y.S.2d 977 (Sup. Ct. 1986).

¹¹⁸ *Id.* at 981 (quoting *State v. Washington*, 494 A.2d 335, 337 (N.J. Super. Ct. App. Div. 1985)).

¹¹⁹ *Id.* (quoting *Washington*, 494 A.2d at 337).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Algarin*, 498 N.Y.S.2d at 981.

¹²³ *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985); *see also Stincer*, 482 U.S. at 744 n.17 (majority opinion) (stating that to determine whether or not one's right to confrontation has been violated, “[t]he appropriate question is whether there has been any interference with the defendant's opportunity for effective cross-examination”); 5 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 1397, at 158 (Chadbourn rev. ed. 1974) (“There never was at common law any recognized right to an indispensable thing called confrontation as distinguished from cross-examination. There was a right to cross-examination as indispensable, and that right was involved in and secured by confrontation; it was the same right under different names.”).

Second, the use of live video testimony in *Wrotten* furthers similar purposes as in child sexual abuse cases. Most states have created statutes permitting the use of two-way testimony in child sexual abuse cases because of the difficulty in prosecuting a crime when there are no witnesses other than the victim, and the victim is either unable or reluctant to testify.¹²⁴ In *Wrotten*, the victim was the only witness to the crime and his inability to return to the state should not justify losing his chance to testify. Unlike cases where there will be testimony but with the possibility of being distorted due to intimidation, in situations where a key witness is *physically* unable to travel to the courthouse to testify, prohibiting the use of live video testimony means the witness' testimony will not occur at all.¹²⁵ Without the testimony of a "key" witness, especially when he or she is the sole witness to the crime, the court has not only compromised the truth-seeking purpose but completely closed off the opportunity for the truth to come in.

Courts fear where the line will be drawn—what constitutes "necessity"—if they permit the use of this technology outside of child abuse crimes.¹²⁶ Necessity may warrant use of such technology by someone who is fatally ill or disabled, but does it warrant use by one who resides across the country and is just too busy to travel to the state to testify? If the variety of circumstances becomes too broad, how far is it before the validity of the Confrontation Clause is eroded? Although the line remains to be drawn, the line should encompass crimes in which the person using the technology is a key witness to the incident and physically unable to travel to the courthouse. The need to preserve key testimony and to protect the witness from risking his health to testify clearly constitutes "necessity."¹²⁷

¹²⁴ *In re Noel O.*, 855 N.Y.S.2d 318, 322 (Fam. Ct. 2008).

¹²⁵ See J. Steven Beckett & Steven D. Stennett, *The Elder Witness—The Admissibility of Closed Circuit Television Testimony after Maryland v. Craig*, 7 ELDER L.J. 313, 314 (1999) ("The witness could be declared unavailable and deposed, but depositions are used rarely in criminal cases and live testimony is considered much more effective in convincing a jury."); see also *Wrotten III*, 923 N.E.2d at 1100-01 (noting that Criminal Procedure Law (CPL) Article 660 requires depositions to take place in New York, and therefore would leave a witness unable to travel to New York without *any* options).

¹²⁶ See Ralph H. Kohlmann, *The Presumption of Innocence: Patching the Tattered Cloak after Maryland v. Craig*, 27 ST. MARY'S L.J. 389, 405 (1996) ("Now that the constitutional dam concerning face-to-face confrontation has been broken, it is difficult to predict with any certainty where the river of logical extension will flow.").

¹²⁷ See *Wrotten III*, 923 N.E.2d at 1103 (finding that the "public policy of justly resolving

Juwanna Wrotten put her elderly victim's health at risk when she assaulted him with a hammer. He should not have to be re-victimized by further risking his health in order to testify.

Further, in cases where this witness is the accuser, it actually gives the defendant access to his accuser which he otherwise would not have since the accuser is unable to travel to the courthouse.¹²⁸ Permitting the use of this technology in such situations would further the defendant's ability to confront his accuser rather than limit it, since no confrontation would occur at all if the technology was not permitted.¹²⁹ Permitting the use of two-way testimony would also benefit defendants who are charged with a crime they did not commit, and the only person who was able to observe who actually committed the crime is physically unable to travel to the courthouse.¹³⁰ Although this example does not implement one's Confrontation Clause rights because the defendant is seeking the use of the technology, as was the case in *Banki*, it illustrates the necessity of using closed-circuit television and the fact that its use furthers the truth-seeking process for both the prosecution and the defense.¹³¹

Lastly, while many scholars will cling to the fact that without face-to-face confrontation the psychological effect it creates is lost, it is questionable whether that psychological effect is essential to the truth-seeking process.¹³² The true purpose of the adversarial process

criminal cases while at the same time protecting the well-being of a witness" is an important public policy that necessitates the use of two-way video testimony). The necessity of preserving key testimony and protecting the physical health of the witness is further proven by the fact that the Federal Rules of Criminal Procedure provide a rule to do just that. Rule 15 allows for the use of depositions when the witness is unavailable. FED. R. CRIM. P. 15. Unavailability is defined under the Federal Rules of Evidence and includes situations where a witness "is unable to be present or to testify at the hearing because of . . . physical or mental illness or infirmity." FED. R. EVID. 804(a)(4).

¹²⁸ Beckett & Stennett, *supra* note 125, at 314 (proposing that a rule should be adopted that would allow the use of closed-circuit television for the elderly and the disabled to testify and that such a rule "affords and anticipates equal access by criminal defendants to such elder witnesses").

¹²⁹ *See id.* at 314, 333.

¹³⁰ *Id.* at 315.

¹³¹ *Id.* at 316.

¹³² *See* Gail D. Cecchettini-Whaley, *Children as Witnesses after Maryland v. Craig*, 65 S. CAL. L. REV. 1993, 2036 (1992) ("[E]vidence regarding whether face-to-face confrontation actually enhances reliability of testimony and encourages truth telling is needed. If face-to-face confrontation does not produce more-reliable evidence, further research must determine whether the symbolic value of face-to-face confrontation to the defendant and to our legal system is worth preserving . . .").

is to seek the truth,¹³³ not to intimidate.¹³⁴ It has been repeatedly stated by the opposition that physical face-to-face confrontation is necessary to seek the truth.¹³⁵ However, the cross-examination of the witness brings out the truth,¹³⁶ not the face-to-face aspect.¹³⁷ In *Craig*, Justice O'Connor stated that cross-examination “ ‘expose[s] testimonial infirmities such as forgetfulness, confusion, or evasion . . . calling to the attention of the factfinder [sic] the reasons for giving scant weight to the witness’ testimony.’ ”¹³⁸ In addition, making it possible for a key witness to testify, who otherwise would not be

¹³³ *Teahan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966) (“The basic purpose of a trial is the determination of truth . . .”).

¹³⁴ See *Davis*, 415 U.S. at 316 (noting that confrontation was not for the “idle purpose of gazing upon the witness, or of being gazed upon by him” (quoting 5 J. WIGMORE, EVIDENCE § 1395, at 123)); see also Lisa R. Miller, *Constitutional Law—Confrontation Clause—Allowing a Child Abuse Victim to Testify via One-way Closed-circuit Television Does Not Violate a Criminal Defendant’s Sixth Amendment Confrontation Clause Right if the Trial Court Specifically Finds Such a Procedure Necessary to Protect the Child’s Welfare*, 22 ST. MARY’S L.J. 555, 573-74 (1990). The article explains that intimidation is not the intended purpose of the Confrontation Clause by stating:

[C]losed-circuit television procedure provides great protection for the child while depriving the defendant only whatever advantage he might have gained through intimidation of the testifying child. Such an advantage, however, is neither within the intended purpose of the confrontation clause, nor does it justify risking the emotional health of the child.

Id.

¹³⁵ *Coy*, 487 U.S. at 1019 (“It is always more difficult to tell a lie about a person ‘to his face’ than ‘behind his back.’ ”); *Jay v. Boyd*, 351 U.S. 345, 375-76 (1956) (Douglas, J., dissenting) (stating that a witness “may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts”); *Cinella*, *supra* note 107, at 156 (“Face-to-face confrontation plays an essential role in this process by reducing the possibility that a witness will lie on the stand.”).

¹³⁶ *Pointer*, 380 U.S. at 404 (“[C]ertainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case.”); see also Josephine Ross, *What’s Reliability Got to Do with the Confrontation Clause after Crawford?*, 14 WIDENER L. REV. 383, 392 (2009) (“It is cross-examination, much more than face-to-face accusation, that is the fundamental way the Confrontation Clause functions in the modern trial.”). The article goes on to note that “cross-examination is a means to get to the truth.” *Id.*

¹³⁷ “Witness intimidation is often the reason why a witness’s testimony at trial is contrary or contradictory to that witness’s earlier statements to the police.” Joan Comparet-Cassani, *Balancing the Anonymity of Threatened Witnesses Versus a Defendant’s Right of Confrontation: The Waiver Doctrine after Alvarado*, 39 SAN DIEGO L. REV. 1165, 1200 (2002) (describing a case in which the defendant’s brother sat in the courtroom glaring at the witnesses which subsequently led the witnesses to recant their earlier testimony and deny the statements they had given to police).

¹³⁸ *Craig*, 497 U.S. at 847 (quoting *Fensterer*, 474 U.S. at 22).

able, furthers the goal of seeking the truth.¹³⁹ Facing one's accuser face-to-face furthers the goal of intimidation.¹⁴⁰

The reason why courts allow limitations on one's Confrontation Clause rights, such as using closed circuit television to testify, is to guarantee the truthfulness of the testimony.¹⁴¹ If the truthfulness of the testimony is ensured by not adhering to strict face-to-face confrontation, then adhering to face-to-face confrontation must compromise the truth in some way.¹⁴² Justice O'Connor acknowledged this in *Craig* when she stated, "Indeed, where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact *disserve* the Confrontation Clause's truth-seeking goal."¹⁴³

Although the distress created by face-to-face confrontation with the defendant has most commonly been acknowledged in child sexual abuse cases, it is not unique to child abuse victims.¹⁴⁴ Face-

¹³⁹ Christine L. Olson, *Accusations from Abroad: Testimony of Unavailable Witnesses via Live Two-way Videoconferencing Does Not Violate the Confrontation Clause of the Sixth Amendment*, 41 U.C. DAVIS L. REV. 1671, 1698 (2008) (stating that two-way video testimony of unavailable witnesses "is necessary to further the important public policy of providing the fact-finder with truthful testimony").

¹⁴⁰ See *Wrotten III*, 923 N.E.2d at 1106 (Smith, J., dissenting) (describing the psychological effect face-to-face confrontation has on a witness); John A. Mayers, *Coy v. Iowa: A Constitutional Right of Intimidation*, 16 PEPP. L. REV. 709, 713 (1989) (arguing that the Right to Face-to-face Confrontation is really just a Right of Intimidation); see also John Paul Serketic, *A Conflict of Interests: The Constitutionality of Closed-circuit Television in Child Sexual Abuse Cases*, 27 VAL. U. L. REV. 217, 233-34 (1992) (noting that "face-to-face confrontation may inhibit the victim from pressing charges").

¹⁴¹ See Alanna Clair, *An Opportunity for Effective Cross-examination: Limits on the Confrontation Right of the Pro Se Defendant*, 42 U. MICH. J.L. REFORM 719, 732 (2009) ("The limitations on a defendant's strict constitutional right to confront his accusers are most often justified by the court's desire to ensure truthful and unencumbered testimony.").

¹⁴² See *id.*

¹⁴³ *Craig*, 497 U.S. at 857 (citing *Coy*, 487 U.S. at 1032).

¹⁴⁴ See *Coy*, 487 U.S. at 1020 ("[F]ace-to-face presence may, unfortunately, upset the truthful rape victim . . ."); see also *United States v. Benfield*, 593 F.2d 815, 817 (8th Cir. 1979) (denying the request by an adult woman, who was the victim of a kidnapping, to provide a videotaped deposition instead of testifying at trial because of her fear of being in the same room as the defendant); Clair, *supra* note 141, at 719 (recognizing the use of intimidation by a defendant on surviving victims of invasive crimes, such as rape, kidnapping, and assault); Nora V. Demleitner, *Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options?*, 46 AM. J. COMP. L. 641, 644 (1998) ("[W]itness intimidation has become a more publicized issue in cases of domestic abuse."); Kohlmann, *supra* note 126, at 404.

After all, if *Craig* essentially allows the state to protect a class of witnesses from the trauma of testifying in the presence of the accused upon a showing of necessity, it follows that an argument for necessity could

to-face confrontation, forcing the victim to sit a short distance from the perpetrator who victimized them, can hinder the truth-seeking process by deterring victims from testifying because it increases the fear of being further retaliated against either by the defendant if set free,¹⁴⁵ or if not, by his friends and family on the outside.¹⁴⁶ In some cases, it even deters one from reporting the incident to begin with.¹⁴⁷

“[T]he Confrontation Clause serves two distinct purposes: first and primarily, to secure the opportunity of cross-examination and secondarily, to enable a jury to observe a witness’ demeanor when brought face to face with the accused.”¹⁴⁸ Bringing a witness face to face with the accused was a method used to “enable a jury to observe a witness’ demeanor.”¹⁴⁹ Bringing a witness face to face with the accused was not a purpose within itself¹⁵⁰ and should not be made one by a defendant’s desire to intimidate his witnesses. As the Supreme Court has said,

“The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining

be persuasively asserted on behalf of rape victims, victims of vicious assaults, or elderly victims.

Id.

¹⁴⁵ See PETER FINN, USING CIVIL REMEDIES FOR CRIMINAL BEHAVIOR: RATIONALE, CASE STUDIES, AND CONSTITUTIONAL ISSUES 23 (1994).

Police and prosecutors often find it difficult to deal effectively with hate crime in the criminal justice system. Evidence may be insufficient to convict the perpetrator according to a standard of beyond a reasonable doubt, often because victims and witnesses refuse to testify in hate crime cases when they fear that repeated court appearances will expose them to retaliation.

Id.

¹⁴⁶ See Joan Comparet-Cassani, *supra* note 137, at 1200 (describing a case in which the defendant’s brother sat in the courtroom glaring at the witnesses which subsequently led the witnesses to recant their earlier testimony and deny the statements they had given to police).

¹⁴⁷ John Paul Serketich, *supra* note 140, at 233-34 (noting that “face-to-face confrontation may inhibit the victim from pressing charges”).

¹⁴⁸ *Algarin*, 498 N.Y.S.2d at 981 (citing *Mattox*, 156 U.S. at 242-43).

¹⁴⁹ See *id.*

¹⁵⁰ See *id.*

immediate answers.”¹⁵¹

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¹⁵¹ *Davis*, 415 U.S. at 315-16 (quoting 5 J. WIGMORE, EVIDENCE § 1395, at 123).

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