WROTTEN BUT NOT DEAD: HIGH COURT OF NEW YORK SIGNALS LEGISLATURE TO REVIEW TELEVISED TESTIMONY AT CRIMINAL TRIAL

Michael S. Quinn[*]

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[*] J.D. Candidate 2011 Albany Law School; B.S. 2004 Cornell University. I am grateful for the patience and guidance of Professor Peter Preiser. Also, I would like to thank Sonny Grosso and Peter D. Coddington for introducing me to the Law, and my mother for keeping me on the right side of it. Feedback is welcome at mike.s.quinn@gmail.com.

I. INTRODUCTION

"[C]ourtrooms . . . cannot sit idly by, in a cocoon of yesteryear, while society and technology race towards the next millennium."[1]

The next millennium is now. In 2004, Live Video Teleconferencing (VTC) testimony of an adult witness was used at criminal trial in the Bronx County Supreme Court.[2] Pitting the policy interest of preserving the well-being of an infirmed elderly witness against a defendant's right to face-to-face confrontation, a case of first impression was born.[3] In late 2009, the New York State Court of Appeals reviewed *People v. Wrotten*,[4] appraising the constitutionality of this technologically infused trial testimony.[5] To resolve the appeal, the high court relied on the opinion of Supreme Court Justice Sandra Day O'Connor who in *Maryland v. Craig* stated "[w]e have never held . . . that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial."[6]

The thrust of this note is to convince the New York State Legislature to run with *Wrotten* and enact a statute allowing unavailable infirmed witnesses to testify via two-way video at criminal trial. As revealed below, although the *Wrotten* majority "justly resolv[ed the] criminal case[ ], while at the same time protecting the well-being of a witness," its untidy language wells with an opportunity for prospective abuse in future cases.[7] The Legislature ought to plug these leaks, for variations of this infant

[1] Harrell v. Florida, 709 So.2d 1364, 1367, 1372 (Fla. 1998) (case granting the use of video testimony at criminal trial in New York's sister state of Florida).

[2] People v. Wrotten, 923 N.E.2d 1099, 1100 (N.Y. 2009), *aff'd*, 901 N.Y.S.2d 265 (N.Y. App. Div. 2010), *cert. denied*, 130 S.Ct. 2520 (U.S. Jun. 7, 2010), *cert. denied*, (U.S. Jan. 18, 2011) (No. 10-7698); *see also* Chrisena Coleman, *Beating Case to Jury*, DAILY NEWS, Oct. 4, 2004, http://www.nydailynews.com/archives/ny_local/2004/10/04/2004-10-04_beating_case_to_jury__accuse.html.

[3] *Wrotten*, 923 N.E.2d at 1100–02; Press Release, Office of the Bronx Cnty. Dist. Attorney, One Time Home Care Attendant Sentenced to Five Years Imprisonment for Assaulting an Elderly Former Client, (Nov. 23, 2004), *available at* http://bronxda.nyc.gov/information/2004/case89.htm.

[4] 923 N.E.2d. 1099.

[5] *Id.* at 1102–03.

[6] *Id.* at 1102; Maryland v. Craig, 497 U.S. 836, 844 (1990).

[7] *Wrotten*, 923 N.E.2d at 1103.

procedure likely will be deemed repugnant to the Constitution. To avoid such danger, New York should codify a rigid statute extending VTC testimony only to infirmed witnesses whose health and well-being would be severely jeopardized upon having to travel to and attend court.[8] This note will commence with the back-story of the *Wrotten* case. It will then spring forward, exploring televised testimony in the criminal courtroom. Reaching the halfway mark, a review of the legal landscape will unfurl, whereat discussion of the *Wrotten* appeal will follow. Lastly, arguments for future legislation will be considered.

II. THE BACK STORY

He would have, had he been spryer. If he were younger and healthier, he would have walked right into that courtroom, looked her square in the face, and pointing the finger she had broken, he would have said, "that is her your honor. That is the woman." His assailant would have her day in court. But with coronary heart disease and a penchant for falling, the eighty-five year old victim was just too frail.[9] The strain from travel and trial would be too much on his health. It was not a question of would he appear. Mr. Liebowitz could not appear in court. And without his testimony, a Bronx Prosecutor had no case.[10]

Back in June of 2003, Juwanna Wrotten, a former health aide to the Liebowitz family, paid a visit to the Liebowitz residence.[11] According to Mr. Liebowitz, the defendant occasionally came around, even though she stopped working for him in 2001 after he moved his wife into a local Bronx nursing home.[12] On this

[8] *Cf.* N.Y. CRIM. PROC. LAW §§ 65.00-65.30 (McKinney 2010) (granting use of live video testimony by child victims of abuse crimes when certain conditions are met).

[9] *See Wrotten*, 923 N.E.2d at 1101.

[10] *See Wrotten*, 871 N.Y.S.2d 28, 47 (N.Y. App. Div. 2008) (Friedman, J., dissenting) (arguing that without the testimony, the prosecution could not have gone forward). Mr. Liebowitz was the only eyewitness to the incident. Furthermore, not only did Ms. Wrotten admit she was at the Liebowitz's house on the date of the incident, but as a visiting home aide, she had also been a guest on many prior occasions. These frequent visitations lessen the validity of fingerprint evidence. *See id.* at 29 (explaining that Ms. Wrotten had visited the complainant and his wife frequently before his wife was moved to a nursing home); *see also* OFFICE OF THE BRONX CNTY. DIST. ATTORNEY, ANNUAL REPORT 2004, 25–26 (2004), *available at* http://bronxda.nyc.gov/docs/ar2004bxda.pdf (noting that Mr. Liebowitz was the only eyewitness and the use of VTC technology allowed him to effectively testify before the court).

[11] *Wrotten*, 923 N.E.2d at 1100.

[12] *See Wrotten,* 871 N.Y.S.2d at 29; NEW YORK STATE COURT OF APPEALS,

particular visit, as Mr. Liebowitz fumbled about his refrigerator, Ms. Wrotten slammed a hammer into the back of his head.[13] He sustained five lacerations on his skull as well as two broken fingers.[14] According to Mr. Liebowitz, during the assault the defendant demanded money, and after receiving it, left him to bleed, lying on the floor of his kitchen.[15] After surviving the incident, Mr. Liebowitz was relocated to a California nursing home to be closer to family.[16]

The New York State Legislature has enacted various laws to combat elder abuse.[17] Such headway, however, has failed to

BACKGROUND SUMMARIES AND ATTORNEY CONTACTS: WEEK OF NOVEMBER17-18, 2009, PEOPLE V. JUWANNA WROTTEN (2009) (No. 199) [hereinafter WROTTEN BACKGROUND SUMMARIES].

[13] *Wrotten*, 923 N.E.2d at 1100; Chrisena Coleman, *Aide's Assault Retrial Begins*, DAILY NEWS, Jan. 12, 2006, http://www.nydailynews.com/archives/ny_local/2006/01/12/2006-01-12_aide_s_assault_retrial_begins.html.

[14] *Wrotten*, 923 N.E.2d at 1100.

[15] *Id.*; *see also* Coleman, *supra* note 13.

[16] *Wrotten*, 923 N.E.2d at 1100; WROTTEN BACKGROUND SUMMARIES, *supra* note 12.

[17] The New York State Legislature has enacted statutes elevating the punishment of crimes committed by "caregiver[s]" which "endanger[ ] the welfare of vulnerable elderly person[s]." *See* N.Y. PENAL LAW § 260.32 (McKinney 2010); PENAL § 260.31 ("'Vulnerable elderly person' means a person sixty years of age or older who is suffering from a disease or infirmity associated with advanced age and manifested by demonstrable physical, mental or emotional dysfunction to the extent that the person is incapable of adequately providing for his or her own health or personal care."); PENAL § 260.32 (criminalizing negligent or reckless endangerment of vulnerable elderly person by caregiver); PENAL § 260.34 (criminalizing endangerment of vulnerable elderly person by caregiver); PENAL § 260.25 (criminalizing the endangerment of the welfare of a incompetent or physically disabled person). Additionally, N.Y. State has also implemented, through law, a Committee for The Coordination of Police Services to Elderly Persons. N.Y. EXEC. LAW § 844-b (McKinney 2010). It is no wonder New York State has carved out policies for elderly persons and elderly abuse. In 2009, 13.4% of New York's population was sixty-five and older. U.S. CENSUS BUREAU, *State & County QuickFacts: New York*, http://quickfacts.census.gov/qfd/states/36000.html (last visited Dec. 20, 2010). This percentage will surely increase as baby boomers age. *See* WAN HE ET AL., U.S. CENSUS BUREAU, 65+ IN THE UNITED STATES: 2005 1 (2005), *available at* http://www.census.gov/prod/2006pubs/p23-209.pdf (stating that the growth rate of elderly Americans 65 and older will increase significantly between the years 2010 to 2030). Unfortunately, crimes against the golden demographic are commonplace. While the statistics are shaky, it is believed that "between 1 and 2 million Americans age 65 or older have been injured, exploited, or otherwise mistreated by someone on whom they depended for care or protection." NAT'L CTR. ON ELDER ABUSE, FACT SHEET: ELDER ABUSE PREVALENCE AND INCIDENCE (2005), *available at* http://www.ncea.aoa.gov/NCEA root/main_site/pdf/publication/FinalStatistics050331.pdf. However, "there are

alleviate procedural testimonial barriers faced by infirmed witnesses like Mr. Liebowitz.[18] Confronted by this silence in the criminal procedure regime, an enterprising Bronx Supreme Court Judge crafted a novel solution in *People v. Wrotten*.[19] By citing an obscure judiciary discretion law[20] and a section catering to child abuse victims,[21] the deft judge aptly concluded Mr. Liebowitz could testify at trial without traveling to the Bronx County Courthouse.[22] This legal invention, forged in the warren of that Bronx limestone landmark, likely trumps even the ingenuity of the very technology allowing the testimony to

no official national statistics." *Id.* Many incidences of elder abuse go unreported. It is thought that "for every one case of elder abuse . . . five more go unreported." *Id.* According to Erica F. Wood from the American Bar Association Commission on Law and Aging, "the penumbra of additional data elements that might be available through health care, long term care, criminal justice, fiduciary, and legal services networks has remained largely unexplored." ERICA F. WOOD, NAT'L CTR. ON ELDER ABUSE, THE AVAILABILITY AND UTILITY OF INTERDISCIPLINARY DATA ON ELDER ABUSE: A WHITE PAPER FOR THE NATIONAL CENTER ON ELDER ABUSE, FOR THE NATIONAL CENTER ON ELDER ABUSE 7 (May 2006), *available at* http://www.ncea.aoa.gov/ncearoot/Main_Site/pdf/publication/WhitePaper060404.pdf. Many more incidents surely go unnoticed. *See* Arthur Meirson, *Prosecuting Elder Abuse: Setting the Gold Standard in the Golden State*, 60 HASTINGS L.J. 431, 435 (2008) (noting that among the estimated five million cases of elder abuse, of these, approximately 84% will remain unreported); *see also* CHAIRMAN OF H. SUBCOMM. ON HEALTH & LONG-TERM CARE OF THE H. SELECT COMM. ON AGING, 101ST CONG., ELDER ABUSE: A DECADE OF SHAME AND INACTION ix, xi, xiii (Comm. Print 1990) (noting "that elderly abuse is far less likely to be reported than child abuse" and that incidents of elder abuse is increasing nationally); *Society's Secret Shame: Elder Abuse and Family Violence: Hearing Before S. Spec. Comm. on Aging*, 104th Cong. 2 (1995) (opening statement of Sen. William S. Cohen, Chairman, Senate Spec. Comm. on Aging) (estimating rates of reported abuse as low as one in fourteen, thus suggesting that nearly 93% of elder abuse goes unreported).

[18] *Wrotten*, 923 N.E.2d at 1101–02 (noting that while the Criminal Procedure Laws address VTC in regard to child witnesses in the prosecution of sex crimes, it is silent on testimony from other types of witnesses like the elderly, infirm and those physically incapable of appearing in court).

[19] *Id.* at 1101.

[20] N.Y. JUD. LAW § 2-b (3) (McKinney 2010) ("A court of record has power . . . to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it.").

[21] N.Y. CRIM. PROC. LAW §§ 65.10-65.30 (McKinney 2010) (providing that children may testify via two-way television in sex abuse cases when testifying before the accused would likely cause severe emotional and mental harm).

[22] *Wrotten*, 923 N.E.2d at 1100. Bronx Supreme Court Judge Steven Lloyd Barrett heard the application for televised testimony, while Bronx County Supreme Court Judge Harold Silverman reviewed the pre-trial hearing of witness availability, the jury trial and sentencing. People v. Wrotten, 871 N.Y.S.2d 28, 29, 44 (N.Y. App Div. 2008).

occur.[23]

A. The Technology

Courtrooms have employed video technology in a variety of useful manners.[24] From revealing crime scene footage to recording heated oral debates, it is a welcome fixture. One distinct area where the technology plays an important role is in witness testimony. Video testimony first appeared in The New York Criminal Procedural Code in 1980.[25] That year, the State Legislature amended a section of the Conditional Examination statute to permit the "record[ing] by videotape"[26] of "a witness . . . in [an] action [to] be examined conditionally under oath in order that such testimony may be received into evidence at [a] subsequent proceeding[ ] in or related to the action."[27] A

[23] *Wrotten*, 923 N.E.2d at 1101–02 (finding that courts have authority from the Legislature to use "innovative procedures" to properly apply the laws of the jurisdiction). The Mario Merola Building off the Grand Concourse no longer houses Bronx County Supreme Court Criminal Division. *See* NYC CITYWIDE ADMIN. SERVICES, *DCAS Managed Public Buildings,* NYC.GOV, http://www.nyc.gov/html/dcas/html/resources/bronx_countycourt.shtml (last visited Dec. 20, 2010). On January 28, 2009, the Bronx's merged Criminal Court moved to The Bronx Hall of Justice. Daniel Wise, *Hall of Justice Opens*, 239 N.Y. L.J. 1 (2008). The move coincided with another notable change of address: the new Yankee Stadium. Richard Sandomir, *City Approves $370.9 Million to Complete Yankee Stadium,* N.Y. TIMES, Jan. 16, 2009, http://www.nytimes.com/2009/01/17/nyregion/17bonds.html?_r=2&scp=6&sq=new+yankee+stadium+construction&st=nyt.

[24] *See, e.g.,* N.Y. CRIM. PROC. LAW §§ 660.10-660.40 (McKinney 2010) (providing that videotaped recordings or "other photographic method[s]" may be used under certain circumstances when securing testimony for future use in subsequent proceedings); *See also* Fredric I. Lederer, *An Environment of Change: The Effect of Courtroom Technologies On and In Appellate Proceedings and Courtrooms,* 2 J. APP. PRAC. & PROCESS 251, 255–58, 266–69 (2000) (examining the growing technological advances occurring in courtrooms including appearance by VTC).

[25] 1980 N.Y. Laws 1248.

[26] *Id.*

[27] N.Y. CRIM. PROC. LAW § 660.10 (McKinney 2010). A conditional examination may be used when, upon finding, there is a reasonable chance that a material witness to a criminal action will be unable to attend a future trial proceeding "because he or she is . . . physically ill or incapacitated." Peter Preiser, Practice Commentaries, N.Y. Crim. Proc. Law § 660.10 (McKinney 2009). This recorded testimony could not be employed in *Wrotten*, because the statute specifically prohibits out of state examinations. N.Y. CRIM. PROC. LAW § 660.50-660.60 (McKinney 2009). *See also* 22 N.Y. COMP. CODES R. & REGS. tit. 22, § 32.3 (2010) (stating that during the videotaping of a conditional examination of a witness in a criminal case, "[t]he person being examined shall be sworn as a witness").

conditional examination allows parties to memorialize testimony before the witness's health deteriorates.[28] In amending the statute, the Legislature recognized the value of supplementing a written transcript with audio-visual recordings.[29] The video technology "permit[ed] the trier of the fact to observe the demeanor of the witness" during examination in an actual trial.[30] According to *People v. Carter* this was an important feature:

> [T]he fact-finder, be it the court or a jury, should be able to see and hear the witness, since the appearance, attitude and demeanor of a witness upon being questioned and while before the court are matters to be taken into consideration in testing veracity and in determining the weight to be accorded to his or her testimony.[31]

Unfortunately, recorded testimony has limitations. A fixed medium restrains "the ordinary expectation of immediacy, spontaneity, and the opportunity for follow-up in real-time as a means of testing the evidence."[32] Therefore, while pre-recorded

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[28] *See* N.Y. CRIM. PROC. LAW §§ 660.10-660.40 (McKinney 2010).

[29] *See* Peter Preiser, Practice Commentaries, N.Y. CRIM. PROC. LAW § 660.40 (McKinney 2009) (noting that the rationale for the amendment was that a video recording "enhance[s] the utility of the [conditional examination] process by permitting the trier of the fact to observe the demeanor of the witness during the testimony").

[30] *Id.*

[31] People v. Carter, 333 N.E.2d 177, 180 (N.Y. 1975) (citing Schricker v. City of N.Y., 316 N.Y.S.2d 170 (N.Y. App. Div. 1970)). *Carter* further announced the benefit that live testimony outweighed the use of a cold interrogatory testimony. Interrogatories are allowed under an examination by commission as defined in N.Y. CRIM. PROC. LAW § 680.10 (McKinney 2010). *See Carter*, 333 N.E.2d at 179–81. A "commission" is a procedure in which a New York State court may, upon request by a defendant, authorize an agent of the court to conduct a recorded examination of a witness under oath outside of the state. N.Y. CRIM. PROC. LAW §§ 680.10, 680.30 (McKinney 2010). Approval of this procedure allows such out-of-state testimony to be entered into evidence at trial. *Id.* § 680.10. This procedure was not conducted in *Wrotten* because only the defendant can initiate the process. People v. Wrotten, 923 N.E.2d 1099, 1001 n.1 (N.Y. 2009). It is also important to recognize that a commission by interrogatory would likely be deemed less reliable than Live Video Testimony. The use of a cold interrogatory "restricts the opposing parties in the effectiveness and extent of examination and cross-examination, prevents jurors from asking questions where proper, and precludes the Trial Judge from taking part in the examination of witnesses . . . 'to elicit significant facts, [or] to clarify or enlighten an issue.'" *Carter*, 333 N.E.2d at 180–81 (citation omitted). While not the focus of this note, in light of VTC testimony technology and its application in the *Wrotten* decision, the Legislature ought to consider reviewing CRIM. PROC. § 680.10 (McKinney 2010) (using interrogatory testimony of out-of-state witness), CRIM. PROC. § 640.10 (McKinney 2010) (compelling an out-of-state witness to testify in-state) and CRIM. PROC. § 650.10 (McKinney 2010) (securing an out-of-state incarcerated witness to testify in-state).

[32] Janet Walker & Garry D. Watson, *New Trends in Procedural Law: New*

video can be employed in certain testimonial proceedings, it is likely to leave a jury wanting.[33]

Shortly after Article 660 of the New York Criminal Procedure Law adopted use of video recording, a new mode of video technology entered the legal arena. [34] The introduction of Live Video Teleconferencing allowed for real-time, up-to-the-minute streaming of testimony.[35] The technology provides a medium for instant audio and video communication between two parties in separate locations. With this system, a remotely located witness can appear live in court, from a distant location.

While VTC systems vary, the technology is typically comprised of a "point-to-point" connection between locations housing two or

Technologies and the Civil Litigation Process, 31 HASTINGS INT'L & COMP. L. REV. 251, 272 (2008).

[33] *See* Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259, 268 (2008) ("Video transmission may exaggerate or flatten an applicant's affect and audio transmission may cut off the low and high frequencies of the applicant's voice; both of these anomalies impair the fact finder's ability to assess the veracity of the applicant's story."); Fredric I. Lederer, *The Road to the Virtual Courtroom? A Consideration of Today's--and Tomorrow's--High-Technology Courtrooms,* 50 S.C. L. REV. 799, 819–20 (1999) (reporting skeptically on four experiments that have "indicated . . . jurors perceive remote witnesses just as they perceive in-court witnesses"). However, one author after reviewing a number of experiments "involving thousands of subjects" concludes that, "[w]ith remarkable consistency, the experiments have shown that" an ordinary individual cannot demonstrate a "capacity to detect falsehood or error." Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1104 (1991).

[34] VTC first appeared in a United States criminal court proceeding on July 15, 1982, when a federal judge in Dade County, Florida, authorized the use of closed-circuit video technology to arraign misdemeanor criminal defendants located across town in jail. Jeffrey M. Silbert et al., *The Use of Closed Circuit Television for Conducting Misdemeanor Arraignments in Dade County, Florida*, 38 U. MIAMI L. REV. 657, 657 (1984). Rule 10 of the Federal Rules of Criminal Procedure now permits "[v]ideo teleconferencing . . . to arraign a defendant if the defendant consents." FED. R. CRIM. P. 10(c). The Confrontation Clause, however, does not apply to an arraignment. Video teleconferencing is also used in other "non-trial criminal proceedings such as . . . bail hearings, sentencing, and violations of parole or probation." Zachary M. Hillman, *Pleading Guilty and Video Teleconference: Is a*
Defendant Constitutionally "Present" When Pleading Guilty by Video Teleconference?, 7 J. HIGH TECH. L. 41, 45 (2007).

[35] Under New York law, "'[l]ive, two-way closed-circuit television' means a simultaneous transmission, by closed-circuit television, or other electronic means, between the courtroom and the testimonial room." N.Y. CRIM. PROC. LAW § 65.00(4) (McKinney 2010). For the purposes of this note, the term 'live video teleconference (VTC)' can imposed interchangeable with 'electronic closed circuit television' and 'two-way video teleconferencing.'

more cameras, microphones, video monitors, and "'codec' (the video conferencing hardware)."[36] Through modes such as ISDN (Integrated Service Digital Network) or IP (Internet Protocol), the voices and video images of the out-of-court witness and the in-court personalities are simultaneously transmitted and displayed.[37] Courtroom participants can see and hear out-of-court witnesses, and vice versa.[38] The VTC technology provides concurrent, simultaneous interaction.[39] Such interface grants a trier-of-fact a host of observational benefits, not available on recorded video. "[T]he opportunity of observation often affords the most accurate method of ascertaining the truth."[40] With VTC technology, not only can a judge and jury observe a witness as she is questioned, but each is able to see the demeanor of both witness and opposing party as testimony takes place.[41] A VTC system also allows parties to integrate information from prior testimonies.[42] Up to the minute information can be incorporated into the televised examination and cross-examination. Furthermore, the technology allows a jury to evaluate how a witness (and attorney) responds to evidentiary objections and rephrasing of questions.

Of course, such benefits from VTC testimony are not without shortcomings. Image clarity, for example, may vary depending on the quality of technology in use.[43] Another problem is participants cannot simultaneously look directly at the camera and the screen.[44] This subtly disjointed interaction would not necessarily occur during in person examination. Unflinching eye-to-eye interactions, however, are rare, even in fully corporal situations. Despite these potential flaws, federal and state

[36] Fredric Lederer, *The Legality and Practicality of Remote Witness Testimony*, 20 No. 5 PRAC. LITIGATOR 19, 20 (2009).

[37] *Id.*

[38] *Id.* That is, in a two-way system.

[39] *Id.*

[40] People v. Carter, 333 N.E.2d 177, 179–81 (N.Y. 1975) (citation omitted) (noting that the ability of a court and jury to view the demeanor of and question a witness is more beneficial than the reading of dictated interrogatories).

[41] *See* Lederer, *supra* note 36, at 20; Maryland v. Craig, 497 U.S. 836, 851 (1990).

[42] *See* Edward F. Sherman, *The Evolution of American Civil Trial Process Towards Greater Congruence with Continental Trial Practice*, 7 TUL. J. INT'L & COMP. L. 125, 130 (describing the practices of combining summarized deposition testimony with portions of video-taped testimony).

[43] *See* Jordan S. Gruber, *Video Technology*, 58 AM. JUR. TRIALS 481, § 100 (2010).

[44] *Id.*

statutes have implemented the use of VTC testimony.[45] To offset any problems, laws can be crafted to ensure a necessary level of video and audio clarity.[46] For example, one author recommends the clearness of the Video must be of a quality that "the witness must be able to see and hear into the courtroom and participants in the courtroom must be able to see and hear the witness clearly."[47]

B. The Statutory Law

1. Federal Statutes

Federal statutes have codified the use of live televised testimony in a number of civil and criminal proceedings.[48] The

[45] *See* FED. R. CRIM. P. 5(f) (allowing use of VTC for preliminary hearings with consent of defendant); FED. R. CRIM. P. 10(c) (allowing use of VTC for arraignments with consent of defendant); 18 U.S.C. § 3509(b) (2010) (employing VTC technology when a child victim testifies against his accused assailant under certain circumstances); N.Y. CRIM. PROC. LAW § 65.10 (McKinney 2010) (allowing a child witness, in certain circumstances, to testify at trial via VTC).

[46] *See* N.Y. CRIM. PROC. LAW § 65.30(1) (McKinney 2010) ("The courtroom shall be equipped with monitors sufficient to permit the judge, jury, defendant and attorneys to observe the demeanor of the . . . witness during his or her testimony."); *Id.* § 65.30(4) "([If video equipment] is technologically inadequate to protect the constitutional rights of the defendant, [the court] shall not permit the use of the closed-circuit television procedures authorized by this article."). "Naturally, unless satisfactory technical arrangements can be made, the [video] procedure cannot be used." Peter Preiser, Practice Commentaries, N.Y. CRIM. PRO. LAW § 65.30 (McKinney 2004). *See also*, ARIZ. REV. STAT. ANN. § 13-4253 (2010) (setting forth the standard for allowing testimony by a minor outside the courtroom). Among other requirements, the court must ensure that "[t]he recording equipment was capable of making an accurate recording, the operator was competent and the recording is accurate and is not altered." *Id.* § 13-4253(B)(2); KY. REV. STAT. ANN. § 421.350 (3)(b) (West 2010) ("The Court shall . . . ensure that . . . [t]he recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and is not altered [when allowing VTC in certain cases involving children].").

[47] Christine L. Olson, Comment, *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, 1696 (2008). As High Definition video technology becomes a fixture in video, such anxieties may dissipate further. *Id.* at 1696–97.

[48] The use of video teleconference in court room procedures is well established in civil cases. *See* FED. R. CIV. P. 43(a) (using VTC is appropriate in certain circumstances for witness testimony); *See also* N.Y. C.P.L.R. 3113 (d) (McKinney 2010) ("The parties may stipulate that a deposition be taken by telephone or other remote electronic means and that a party may participate electronically . . . . Unless otherwise stipulated to by the parties, the officer administering the oath shall be physically present at the place of the deposition . . . ."). The use of the video technology has also been applied in

most notable federal statute employing VTC testimony is The Child Victims' and Child Witnesses' Rights Act of 1990.[49] This legislation permits the use of a VTC system when there is a finding that the child will likely suffer emotional trauma from direct contact with an accused abuser.[50] The following guidelines dictate such a finding:

> [I]f the court finds that the child is unable to testify in open court in the presence of the defendant, for any of the following reasons:
>
> (i) The child is unable to testify because of fear.
>
> (ii) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying.
>
> (iii) The child suffers a mental or other infirmity.
>
> (iv) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.[51]

While ultimately rejected, federal rule makers have flirted with the idea of incorporating VTC testimony into the Federal Rules of Criminal Procedure. The 2002 Advisory Committee on Rules of Criminal Procedure recommended the broad implementation of live two-way video presentations when a witness is unavailable.[52] Supreme Court Justice Antonin Scalia

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federal criminal statutes. *See supra*, note 45. The use of Video Testimony has also been applied in administrative law statutes. *See* 8 U.S.C. § 1229a (b)(2)(A)(iii) (2010) (permitting the use of video teleconference technology for deportation hearings in alien detention cases). VTC has been seen at the international criminal prosecution level. *See* Sanja Kutnjak Ivkovic, *Justice by the International Criminal Tribunal for the Former Yugoslavia,* 37 STAN. J. INT'L L. 255, 286 (2001) (noting that multiple witnesses testified via VTC in the *Tadik* criminal case).

[49] 18 U.S.C. § 3509 (2010).

[50] *Id.* § 3509(b).

[51] *Id.* § 3509(b)(1)(B).

[52] FED. R. CRIM. PROC., Statement on Advisory Comm., Amendments to Rule 26(b), 207 F.R.D. 89, 91, 99 (2002). The Supreme Court did not approve the addition of Rule 26(b) to the Federal Rules of Criminal Procedure. *Id.* at 91. The following is the proposed language which was not adopted:

> In the interest of justice, the court may authorize contemporaneous, two-way video presentation in open court of testimony from a witness who is at a different location if:
>
> (1) the requesting party establishes exceptional circumstances for such transmission;
>
> (2) appropriate safeguards for the transmission are used; and
>
> (3) the witness is unavailable within the meaning of Federal Rule of Evidence 804(a)(4)-(5).

Id. at 99 (appendix to statement of Breyer, J.) (Breyer, J., dissenting).

vehemently opposed the proposal.[53] In his response to the proposed amendment, he stated that VTC testimony should be restrained to instances where it would "'further an important public policy . . . [and] where there is a case-specific finding of . . . necessity.'"[54] These are the barriers to overcome when applying the testimonial tool in the courtroom.[55]

2. New York State Statutes

New York State's statutory incorporation of VTC technology preceded the federal government. In 1985, the State Legislature passed a law prescribing the use of live two-way video.[56] In the same vein as the federal statute, New York Criminal Procedure Law Article 65 allows for the use of VTC technology in child abuse and child sex crime cases.[57] The law requires a judicial finding of witness "vulnerability"[58] before the technology is employed.[59] According to Article § 65.20(2):

> A child witness should be declared vulnerable when the court, in accordance with the provisions of this section, determines by clear and convincing evidence that the child witness would suffer serious mental or emotional harm that would substantially impair the child witness' ability to communicate with the finder of fact without the use of live, two-way closed-circuit television.[60]

The law intends to "protect the well-being of a [child victim]"[61] while still permitting the witness to testify, under oath from a

[53] *Id.* at 93–96 (Scalia, J.).

[54] *Id.* at 93 (quoting Maryland v. Craig, 497 U.S. 836, 850, 857–58 (1990)). *But see id.* at 96, 98. (Breyer, J., dissenting) (stating that a refusal to "transmit the proposed [r]ule . . . denies all litigants–prosecutors and consenting defendants alike–the benefits of advances in modern technology . . . that will help to create trial procedures that are both more efficient and more fair").

[55] *See id.* at 93–94 (Scalia, J.).

[56] N.Y. CRIM. PROC. LAW §§ 65.00, 65.30 (McKinney 2010).

[57] *See* CRIM. PROC. § 65.00(1) (allowing the use of VTC technology for cases "concerning an offense defined in article one hundred thirty of the penal law or section 255.25 . . . of such law which is the subject of such criminal proceeding"); *See also* N.Y. PENAL LAW §§ 130.00-130.96 (McKinney 2010) (defining sex offenses); *Id.* § 255.25 (defining crimes of incest in the third degree).

[58] *See* People v. Wrotten, 923 N.E.2d 1099, 1101 (N.Y. 2009). "Article 65 mandates that, on the motion of either party, a court must consider evidence of a child witness's vulnerability and, if the court finds the child to be vulnerable, it must permit video testimony." *Id.* at 1101 n.2 (citing CRIM. PROC. LAW §§ 65.00-65.30).

[59] CRIM. PROC. LAW § 65.20(2), (12).

[60] *Id.* § 65.20(2).

[61] *See id.* § 65.10(3) (stating that nothing in the statute shall preclude the court from protecting the witness).

remote location.[62] Furthermore, the arrangement allows the participants of the courtroom to observe his or her demeanor, and vice versa.[63] The policy of the statute is to protect the mental and psychological health of a child by narrowing the likelihood he or she will suffer from direct contact with his or her abuser.[64]

Although an overarching policy of the State is to protect the health, safety and well-being of all witnesses, Article 65 is "silent as to other types of witnesses" other than child witnesses.[65] Why then do children of sexual abuse crimes receive greater deference? The fast answer is that there is a "compelling need."[66] The implications of this public policy decision, in a greater sense, leads to a discussion on the importance of examining the constitutionality of VTC testimony.

C. The Decisional Law

The policy to protect witnesses may conflict with the constitutional rights of a defendant. One right afforded to a defendant is the opportunity to confront her accused.[67] This Sixth Amendment right has been forged by time[68] and cast in

[62] *See id.* § 65.30(7) ("[T]he vulnerable child witness shall testify under oath . . . .").

[63] Letter of the Budget Report on Bills, dated July 11, 1985, Bill Jacket, L. 1985, ch. 505 at 12–13 ("Use of two-way closed-circuit television, however, can reduce or eliminate the traumatic impact of presenting testimony while protecting the defendants [sic] constitutional right to confront the witness against them. Although physically separated, the two-way closed-circuit television provides unlimited verbal and visual access to and from the child witness, offering an opportunity for full cross examination and the ability for defendant and witness to view each other live on television monitors."). *But see* Letter of The Legal Aid Society, dated July 16, 1985, Bill Jacket, L. 1985, ch. 505 at 57 ("[T]he bill will . . . severely undermine the defendant's right to a fair trial.").

[64] CRIM. PROC. LAW § 65.20(13) ("When the court has determined that a child witness is a vulnerable child witness, it shall make a specific finding as to whether placing the defendant and the child witness in the same room during the testimony of the child witness will contribute to the likelihood that the child witness will suffer severe mental or emotional harm.").

[65] People v. Wrotten, 923 N.E.2d 1099, 1101–02 (N.Y. 2009).

[66] Memorandum of the Attorney General on Sex Crimes-Child Witness/Closed Circuit TV, *reprinted in* , New York State 1981 N.Y. Legislative Annual 200, 200 (1985) ("There is a compelling need to spare abused children from unnecessary psychological harm in the court process.").

[67] U.S. CONST. amend. VI ("[T]he accused shall enjoy the right to . . . be confronted with the witnesses against him . . . .").

[68] According to the King James Bible, while trying Paul, the Roman Governor, Porcius Festus stated, "[i]t is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to

both the United States and New York State Constitutions.[69] And while the drafters of the federal Constitution championed the development of science and technology, they could not have imagined how a technological invention might fit into the scheme of a criminal trial.[70] The advent VTC in criminal courts facilitated the question of what exactly the Sixth Amendment right to confrontation means. Is it meant to cover a right to cross-examination, or also to include a right to corporeally confront a witness face to face? These questions of constitutional interpretation are at the heart of using VTC testimony at criminal trial.[71]

1. Federal Case Law

In 1988, Supreme Court Justice Scalia announced in *Coy v. Iowa,*[72] that the Confrontation Clause, by its construction, provided each criminal defendant an opportunity to confront all trial witnesses "face-to-face."[73] In *Coy*, the defendant was tried for sexually abusing two thirteen year old girls.[74] At trial, the girls were permitted to testify against the defendant in court without actually having to look at him.[75] The trial court blocked the girls from the defendant by a blackened screen when they testified.[76] The court wanted to minimize the emotional harm from directly facing their abuser.[77] Upon reviewing this new

face, and have license to answer for himself concerning the crime laid against him." *Acts* 25:16 (King James). *See also* California v. Green, 399 U.S. 149, 173–74 (1970) (Harlan, J., concurring) ("[T]he Confrontation Clause comes to us on faded parchment. History seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause.").

[69] N.Y. CONST. art. 1, § 6 ("[T]he party accused shall be allowed to appear and defend in person . . . and be confronted with the witnesses against him or her.").

[70] The Constitution includes a section which gives the legislature power to make laws respecting patent and copyright protection of technology. "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. 1, § 8, cl. 8.

[71] Of course, courts have contemplated these questions before the introduction of VTC technology. *See, e.g.*, *Green*, 399 U.S. at 175 (Harlan, J., concurring) ("Simply as a matter of English the [confrontation] clause may be read to confer nothing more than a right to meet face to face all those who appear and give evidence at trial.").

[72] 487 U.S. 1012 (1988).

[73] *Id.* at 1016.

[74] *Id.* at 1014.

[75] *Id.* at 1014–15.

[76] *Id.*

[77] *See id.* at 1015, 1020.

procedure, the Supreme Court held the use of the screen to be unconstitutional because, beyond a generalized finding, there was no actual showing that the procedure would reduce trauma.[78] In its discussion, the Court acknowledged that the "rights conferred by the Confrontation Clause are not absolute," and at times may give way "to further an important public policy."[79] The Court, however, "le[ft] for another day . . . the question whether any exceptions [to the confrontation clause] exist[ed]."[80]

Two years after *Coy*, the Court came up with its first exception.[81] In *Maryland v. Craig*, [82] the Supreme Court tested the constitutionality of using one-way live video testimony as authorized under a Maryland child abuse statute.[83] The majority concluded that the state's interest in protecting the health and welfare of a child abuse victim may sometimes outweigh a defendant's right to face-to-face confrontation.[84] It revealed that the right to confrontation can be abridged to further this important public policy.[85] Writing for the majority, Justice O'Connor crafted a two prong test allowing the absence of 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."[86] The first prong, labeled the necessity prong, required the state to make a case specific finding that testifying in the physical presence of a defendant would cause more than *de minimis* amount of trauma to the particular child.[87] In line with

[78] *Id.* at 1021–22.
[79] *Id.* at 1020–21.
[80] *Id.* at 1021.
[81] Maryland v. Craig, 497 U.S. 836, 853 (1990).
[82] 497 U.S. 836 (1990).
[83] *Id.* at 840. The case involved use of one-way televised testimony by a sexually abused child. During testimony, the child witness was unable to see and hear into the courtroom, but the courtroom could see and hear the child testify. *Id.* at 841–42. The procedure in *Wrotten,* and the legislative recommendations suggested below, however, both use two-way video. N.Y. CRIM. PROC. LAW §§ 65.00-65.30 (McKinney 2010); People v. Wrotten, 923 N.E.2d 1099, 1103 (N.Y. 2009); *see infra* Part V.C. Two-way video allows the witness and the participants in court to observe each other.
[84] *Craig*, 497 U.S. at 853.
[85] *Id.* at 857–58.
[86] *Id.* at 850.
[87] *Id.* at 855–56. The Court did not dictate a minimum showing of the threat of trauma, but rather, looked to the statutory language for some indication that the procedure will meet constitutional standards. *See id.* at 856.

making this case specific finding, the procedure could only be used when necessary to further an important public policy.[88] The second prong, known as the reliability prong, requires the video procedure to retain a certain level of reliability.[89] This second criteria is fulfilled when the witness gives his or her statements under oath, is subject to cross-examination and the procedure allows the jury to see the demeanor of the witness during testimony.[90] Shortly after this constitutional declaration, Congress enacted the Crime Control Act of 1990, of which a portion was codified as 18 U.S.C. § 3509.[91] Federal circuit courts

[88] *Id.* at 850.

[89] *See id.*

[90] *Id.* at 845-46. These requirements fulfill the essence of the Confrontation Clause. As the Court announced in *Craig*, "face-to-face confrontation . . . is not the *sine qua non* of the confrontation right." *Id.* at 847. The Supreme Court has not yet addressed if the case of *Crawford v. Washington* would apply to VTC testimony. 541 U.S. 36, 50–51, 53–54 (2004) (holding that out of court statements are generally banned, unless defendant has an opportunity to cross examine the witness and that the witness is found to be unavailable). A smattering of lower courts have explored *Crawford* in the context of VTC testimony. *See* United States v. Yates, 438 F.3d 1307, 1314 n.4 (11th Cir. 2006) (recognizing that "*Crawford* applies only to testimonial statements made prior to trial, and the live two-way video testimony at issue in this case was presented at trial") (emphasis added); see also *People v. Wolfe*, for an analysis on Crawford which touches upon VTC testimony. No. 288672, 2010 WL 446539, at *1, *3 (Mich. Ct. App. Feb. 9, 2010). In *Wolfe*, the Michigan Court of Appeals stated the use of video testimony does not necessarily infringe upon the ability of the defendant to cross-examine his witness, a right that is "an indispensable means of testing the truthfulness of testimonial assertions." *Id.* at *3; *see* State v. Henriod, 131 P.3d 232, 237–238 (Utah 2006) ("[W]e do not believe *Crawford* implicitly overruled *Craig* because neither the majority nor the concurrence even discussed out-of-court testimony by child witnesses. By its own terms, the *Crawford* holding is limited to testimonial hearsay."). *Craig* relied, in part, on *Ohio v. Roberts*. *Craig*, 497 U.S. at 847; *Roberts* 448 U.S. at 66 (1980) (holding "when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability."). While *Crawford* has since abrogated *Roberts*, this change of law should have no bearing on *Craig*. 561 U.S. at 68. VTC testimony appears to falls outside the scope on the issue of hearsay presented by *Roberts*. Remote VTC testimony is first hand, not second hand evidence. It is not taken prior to a trial, but is conducted real-time, in front of a jury. Its reliability stems from a witness under oath to be examined and cross examined. Therefore, the reliability test in *Craig*, does not touch upon the reliability analysis of pre-trial, out of court statement. Justice Scalia, himself, recognized the reliability discussed in *Roberts* had nothing to do with the reliability prong in evaluating the application of remote video testimony. *Craig*, 448 U.S. at 863 (Scalia, J., dissenting).

[91] Crime Control Act of 1990, Pub. L. No. 101-647, § 104 Stat. 4789. (codified as amended in scattered sections of the U.S.C). Of particular relevance is an

have overwhelmingly upheld the constitutionality of this statute.[92] The courts differ, however, when it comes to a broader application of the technology.[93]

The federal circuits currently disagree over the use of two-way VTC testimony outside the child abuse context.[94] In 2007, the Fifth Circuit reviewed the case of *Horn v. Quarterman*.[95] In this case, a witness to a murder was terminally ill and unable to travel to and testify in court.[96] The trial court allowed him to testify via VTC. The Fifth Circuit held that "the state court's conclusion that it was constitutionally sound for [the witness] to testify via two-way closed-circuit television was not an unreasonable application of clearly established federal law as determined by the Supreme Court."[97] The court reasoned that "it is possible to view *Craig* as allowing a necessity-based exception for face-to-face, in-courtroom confrontation where the witness's inability to testify invokes the state's interest in protecting the witness—from trauma in child sexual abuse cases or, as here, from physical danger or suffering."[98]

In *U.S. v. Gigante,*[99] the Second Circuit also affirmed the use of VTC testimony by an adult witness.[100] In the case, a mob informant who lay on his death bed with inoperable cancer was

amendment to 18 U.S.C § 3509, which permits the use of 2-way closed circuit television as an alternative to live in-court testimony for child victims. 18 U.S.C § 3509 (2010).

92 *See, e.g.,* United States v. Etimani, 328 F.3d 493, 499–501 (9th Cir. 2003); United States v. Moses, 137 F.3d 894, 897–98 (6th Cir. 1998); United States v. Rouse, 111 F.3d 561, 568–69 (8th Cir. 1997); United States v. Miguel, 111 F.3d 666, 668–72 (9th Cir. 1997); United States v. Quintero, 21 F.3d 885, 892–93 (9th Cir. 1994); United States v. Carrier, 9 F.3d 867, 871 (10th Cir. 1993); United States v. Garcia, 7 F.3d 885, 887–88 (9th Cir. 1993); United States v. Farley, 992 F.2d 1122, 1124–25 (10th Cir. 1993).

93 The Second, Fourth and Fifth Circuits have allowed VTC testimony by non-child witnesses, while the Eleventh Circuit has not. *Compare* United States v. Abu Ali, 528 F.3d 210, 243 (4th Cir. 2008) (allowing officials to testify against a war criminal), Horn v. Quarterman, 508 F.3d. 306, 310, 313, 317–20 (5th Cir. 2007) (allowing a terminally ill adult to testify via VTC) *and* United States v. Gigante, 166 F.3d 75, 79–81 (2d Cir. 1999) (allowing a terminally ill adult to testify via VTC)**,** *with* United States v. Yates, 438 F.3d. 1307, 1315–16 (11th Cir. 2006) (disallowing VTC for adult witnesses located in Australia when only burdened was travel to court).

94 See cases cited *supra* note 93.

95 508 F.3d. 306 (5th Cir. 2007).

96 *Id.* at 313.

97 *Id.* at 320.

98 *Id.*

99 166 F.3d 75 (2d Cir. 1999).

100 *Id.* at 78–79.

allowed to testify against the alleged boss of the Genovese crime family.[101] The Court stated that "[u]pon a finding of exceptional circumstances, such as were found in this case, a trial court may allow a witness to testify via two-way closed-circuit television when this furthers the interest of justice."[102] The court recognized that two-way video (as opposed to the one-way transmission used in *Craig*) facilitated a more realistic interaction between the witness and the accused.[103] This added dimension, according to the Second Circuit, closely fulfilled the "face-to-face" aspect of witness confrontation.[104] The defendant was able to see and be seen by the witness in the course of the testimonial procedure.[105] Encouraged by the communication benefits of two-way VTC, the Second Circuit held the government need not, as it had in *Craig*, establish a case specific finding that use of the technology was necessary and would necessitate the fulfillment of an important public policy.[106]

The Eighth Circuit expressly rejected the rationale of *Gigante.*[107] In *U.S. v. Bordeaux*,[108] the circuit held that without conducting a proper hearing to determine the necessity of VTC as outlined in *Craig*, the application of two-way video testimony could not employed.[109] The Eighth Circuit disdained the notion of drifting from *Craig*, just because two-way VTC instead of a one-way system was employed.[110]

The following year, the Eleventh Circuit decided *U.S. v. Yates.*[111] At trial, two adult witnesses physically located in Australia

[101] *Id.* at 79.

[102] *Id.* at 81. The district court, upon application, held a hearing on whether the witness was able to travel to court due to his health condition. *Id.* at 79. The lower court judge announced "[m]edical reports and testimony for the government and defendant fully supported the government's contention, by clear and convincing proof, that the witness could not appear in court." United States v. Gigante, 971 F.Supp. 755, 756 (E.D.N.Y. 1997).

[103] *Gigante*, 166 F.3d. at 81.

[104] *Id.*

[105] *Id.* at 80.

[106] *Id.* at 81 ("Because Judge Weinstein employed a two-way system that preserved the face-to-face confrontation celebrated by *Coy,* it is not necessary to enforce the *Craig* standard in this case.").

[107] United States v. Bordeaux, 400 F.3d 548, 553–55 (8th Cir. 2005).

[108] 400 F.3d 548 (8th Cir. 2005).

[109] *Id.* at 553–55 (holding that because there was a finding that the child-witness was afraid of the courtroom generally and not just the defendant, the witness failed to meet the criteria outlined in *Craig,* and could not testify by means of two-way closed-circuit television).

[110] *Id.* at 554–55.

[111] 438 F.3d. 1307 (11th Cir. 2006).

testified via real-time VTC before a criminal court in Alabama.[112] In allowing this, the pre-trial court did not conduct a hearing, but rather established the necessity of the technology, by granting a pre-trial motion based on the *Gigante* rationale submitted by the Government.[113] In its motion, the Government contended that using VTC testimony was necessary to "'expeditiously and justly resolv[e] the case'" and to "'provid[e] the fact-finder with crucial evidence.'"[114] On appeal, the Eleventh Circuit held that these "are not the type of public policies that are important enough to outweigh the Defendants' rights, to confront their accusers face-to-face."[115] The circuit recognized that there is a difference between a witness burdened by traveling to court and a witness unable to appear.[116] The Circuit further stated there would need to be a "'case-specific finding'" to justify the use of the technology.[117] In other words, the Eleventh Circuit joined the Eighth Circuit in rejecting the *Gigante* rationale.[118] In looking at *Gigante,* however, the Eleventh Circuit conceded that the public policy aim of preserving the health and safety of a witness would have satisfied the *Craig* threshold for using VTC testimony.[119]

Although the federal circuits continue to disagree over the constitutionality of extending VTC testimony, the case law lends insight into the procedural landscape.

2. New York State Case Law

New York State courts are bound by the Fourteenth Amendment to comply with the United States Constitution in making rulings on criminal procedure law.[120] Under a system of federalism, however, New York's highest court has recognized its right to "supplement or expand" its understanding of the rights,

[112] *Id.* at 1309–10.
[113] *Id.* at 1310–16.
[114] *Id.* at 1315–16 (citation omitted).
[115] *Id.* at 1316.
[116] *See id.* at 1317–18, 1317 n.10 (distinguishing cases where health and safety have justified televised testimony of witnesses at trial, from facts where travel itself, prevented a witness from testifying in person). The former reflects the condition of the witness in *Wrotten*. People v. Wrotten, 923 N.E.2d 1099, 1100–01 (N.Y. 2009).
[117] *Yates*, 438 F.3d. at 1313–15 (citation omitted).
[118] *Id.* at 1312–13.
[119] *Id*. at 1313.
[120] *See* People v. P.J. Video, 501 N.E.2d 556, 559–60 (N.Y. 1986) (describing the relationship between the obligation of states to follow the United States Constitution, and the sovereign power of states to make their own laws).

protections and policies afforded to its people.[121] There exists a natural pull, but no strict interest in federal-state uniformity.[122] After all, the federal system of governance affords states the opportunity to experiment and discover.[123] As Supreme Court Justice Louis Brandeis surveyed, "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[124]

Although the federal Sixth Amendment right to confrontation and the New York State Constitution, article I, section 6, are textually the same,[125] the New York Court may conduct a constitutional review based on its own "judicial perception of sound policy, justice and fundamental fairness."[126] This method of governance allowed the New York Court of Appeals to test the use of VTC criminal court testimony even before the Supreme Court issued the *Maryland v. Craig* decision.[127]

In *People v. Cintron*, the New York Court of Appeals tested both the state and federal constitutionality of Article 65.[128] At trial, a child victim, declared vulnerable under Article 65, was allowed to testify via two-way VTC in a criminal sex case.[129] On appeal, the defendant argued that under *Coy,* the use of two-way televised testimony violated his right to confrontation, regardless of the procedure and statutory provisions "designed to minimize

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[121] *Id.*at 559–61.

[122] *Id.* at 561.

[123] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[124] *Id.*

[125] *Compare* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."), *with* N.Y. CONST. art. I, § 6 ("In any trial in any court whatever the party accused[,they] shall be . . . confronted with the witnesses against him or her."). In his dissenting opinion in *Wrotten*, Judge Robert S. Smith recognized that the content of the state and federal rights were the same, and that he "kn[e]w of no authority holding otherwise." People v. Wrotten, 923 N.E.2d 1099, 1106 (N.Y. 2009) (Smith J., dissenting).

[126] *See* People v. P.J. Video, Inc., 501 N.E.2d 556, 559–61 (N.Y. 1986) (citing Earl M. Maltz, *The Emergence of State Constitutional Law: The Dark Side of State Court Activism*, 63 TEX. L. REV. 995, 1001 (1985)).

[127] *Maryland v. Craig,* 497 U.S. 836 (1990), was decided on June 27, 1990. *People v. Cintron*, 551 N.E.2d 561 (N.Y. 1990), was decided five months earlier, on January 11, 1990.

[128] 551 N.E.2d at 566, 568 (N.Y. 1990).

[129] *Id.* at 563.

the extent of the infringement."[130] The New York Court rejected the defendant's interpretation of *Coy,* dismissing such a "categorical rule and decline[d] to adopt one under the State Constitution."[131] Instead, the New York Court recognized the plurality opinion of *Coy* to mean "a defendant's rights of confrontation 'must occasionally give way to considerations of public policy and the necessities of the case . . . .'"[132] In doing so, the Court crafted a rule based on its own interpretation. The rule allowed for the use of VTC testimony where: "(1) an appropriate individualized showing of necessity is made and (2) the infringement on defendant's confrontation rights is kept to a minimum."[133] The Court of Appeals held that, on its face, Article 65 complied with these qualifications and thus, did not infringe upon the rights of a defendant under the State or United States Constitution.[134] The Court also held, however, that in the particular instance, there was an insufficient showing of necessity to warrant televised testimony by the lower court.[135] The Court insisted there must be made a predetermination of witness vulnerability, based on a standard of "clear and convincing evidence."[136] This did not mean a court could not consider its "own observations."[137] It did create, however, a threshold lower courts must use to legally determine the need in allowing a witness to remotely testify. A court must find the witness will likely suffer severe harm if required to testify in court.[138] The appeals court did not see this happening in the scant record of the lower court.[139] The defendant's lack of face-to-face confrontation was therefore unjust.[140]

III. THE *WROTTEN* TRIAL

As was happening in the federal arena, states courts began receiving requests to use VTC testimony at trial by witnesses

130 *Id.* at 566.
131 *Id.*
132 *Id.* at 567 (quoting Mattox v. United States, 156 U.S. 237, 243 (1895)).
133 *Id.* at 567.
134 *Id.* at 570.
135 *Id.* at 571.
136 *Id.* at 568.
137 *Id.* at 569–70 (quotation omitted).
138 *Id.* at 564.
139 *Id.* at 570–71.
140 *Id.* at 571.

falling outside the rubric of vulnerable child statutes.[141] A Bronxite for over eighty years, Mr. Liebowitz was the first adult in a New York to testify via VTC technology.[142] Largely based on his testimony, the trial court convicted Juwanna Wrotten of assault in the second degree and sentenced her to a term of five years.[143] In reviewing the lower court procedure, the New York Court of Appeals focused on the pre-trial hearing and trial testimony procedure.[144]

A. The Hearing

At the Bronx County Supreme Court, Motion Part, the Assistant District Attorney made a request to use live two-way VTC because her key witness was unable to travel to trial from his nursing home in California.[145] The reviewing judge granted the request, ordering a pre-trial hearing in which he evaluated expert medical testimony from both the People and the defendant.[146] The judge insisted the government prove by clear and convincing evidence that the elderly man was not able to travel to court without endangering his health.[147] The People's medical expert testified Mr. Liebowitz was "frail, unsteady on his

[141] *See e.g.,* People v. Wrotten, 923 N.E.2d 1099, 1100-01 (N.Y. 2009); State v. Dale, 883 N.Y.S.2d 433, 434–35 (N.Y. Sup. Ct. 2009) (denying a motion to permit a psychologist to testify via VTC at a parolee hearing); Bush v. State, 193 P.3d 203, 215–16 (Wyo. 2008) (affirming the trial court's decision to allow video testimony of a witness too ill to travel to court); Stevens v. State, 234 S.W.3d 748, 781–83 (Tex. App. 2007) (affirming the trial court's decision to allow use of VTC testimony at trial by a 75-year old witness in bad health); Harrell v. State, 709 So.2d 1364, 1372 (Fla. Super. Ct. 1998) (holding that the trial court rightfully allowed VTC testimony of a foreign-located witnesses in local criminal trial); State v. Sewell, 595 N.W.2d. 207, 212–14 (Minn. Ct. App. 1999) (affirming the constitutionality of VTC testimony of a witness recovering from surgery); Kansas City v. McCoy 525 S.W.2d. 336, 339 (Mo. Sup. Ct. 1975) (admitting expert witness' testimony by VTC as to the nature of a criminal substance found on defendant was not in error); State *ex rel*. Romley v. Superior Court, 909 P.2d. 418, 421 (Ariz. Ct. App. 1995) (affirming the trial court's denial of the prosecutor's motion to allow a 17-year-old mentally disabled victim to testify via VTC); Slawinski v. State, 895 So.2d 483, 484 (Fla. Dist. Ct. App. 2005) (affirming the trial court's decision to allow a witness recovering from heart surgery to testify via VTC in burglary case); Coney v. State, 643 So.2d 654, 655 (Fla. Dist. Ct. App. 1994) (holding that the trial court erred in allowing the use of VTC testimony by a witness).

[142] *See Wrotten*, 923 N.E.2d at 1100–01.

[143] People v. Wrotten, 871 N.Y.S.2d 28, 43–44 (N.Y. App. Div. 2008).

[144] *Wrotten*, 923 N.E.2d at 1100–01.

[145] *Id.* at 1101.

[146] *Id.*

[147] *Wrotten*, 871 N.Y.S.2d at 29.

feet, and had a history of coronary disease . . . ."[148] The expert conveyed that travel to the Bronx court from California would surely jeopardize the health of the unsteady witness.[149] The judge granted the motion in favor of the People.[150] Mr. Liebowitz would be able to participate in the trial of Juwanna Wrotten.

B. The Procedure

At trial, Mr. Liebowitz testified live from California, via two-way VTC.[151] He took an oath on camera.[152] He stated that he could see the defendant, the judge, the defense counsel and the jury in the Bronx court room.[153] He faced the camera for the duration of his testimony.[154] As the old man testified, a live audio/visual feed of the courtroom was displayed for his view.[155] A television monitor in the court room displayed the view of Mr. Liebowitz from his remote location.[156] The judge reported the video image of Mr. Liebowitz was "very clear[ ]" and included "any expressions on his face."[157] The judge, defendant, defense attorney and jury were privy to a single video shot fixed on Mr. Liebowitz.[158] The uninterrupted testimony procedure included a complete examination and cross-examination.[159] This testimony was instrumental in the jury conviction of Juwanna Wrotten.[160]

IV. THE *WROTTEN* DECISION

On December 30, 2008, the First Department Appellate Division reversed the judgment of conviction and declared the use of VTC testimony by Mr. Liebowitz to be unlawful.[161] The New York Court of Appeals subsequently reviewed the mixed issue of fact and law.[162] By a vote of 4-2, the Court reversed the

148 *Wrotten*, 923 N.E.2d at 1101.
149 *Id.*
150 *Id.*
151 *Id.*
152 *See id.* at 1102.
153 *Id.* at 1101.
154 *Id.*
155 *Id.*
156 *Id.*
157 *Id.*
158 *See id.*
159 *Id.* at 1102.
160 *See id.* at 1101.
161 People v. Wrotten, 871 N.Y.S.2d 28, 44 (N.Y. App. Div 2008).
162 *Wrotten,* 923 N.E.2d at 1100.

Appellate Division.[163] Speaking through Judge Carmen Beauchamp Ciparick— over the dissenting opinions of Judges Theodore T. Jones and Robert S. Smith— the majority opinion answered two questions.[164] Firstly, the Court determined that the lower court had the inherent power to fashion such a testimony procedure.[165] Secondly, it concluded that the employment of the technology did not violate the Defendant's right to confrontation and therefore was constitutional at the state and federal level.[166]

Before reviewing the legitimacy of the VTC testimony, the Court of Appeals dug into the validity of this novel procedure. The excavation began by reviewing New York Judicial Law § 2-b (3).[167] The provision of this state law grants discretion to a court of record "to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it."[168] Not surprisingly, this allocation of power must be tempered. In New York, the authority to regulate practice and procedure primarily lies with the Legislature.[169] According to *Voelckers v. Guelli*,[170] courts may authorize performance of a procedure if it does not improperly encroach on legislative functions.[171] Therefore, while a court may have the power to make new rules, it may only do so by first considering available statutes and second, by fashioning the new rule to conform to existing legislation.[172]

In its analysis, the *Wrotten* majority relied on precedent examining Judiciary Law § 2-b (3). In *People v. Ricardo B.,* the Court of Appeals had affirmed the action taken by a trial judge in empanelling two juries, even though New York statutes all

163 *Id.* at 1103, 1107.
164 *Id.* at 1100.
165 *Id.* at 1101–02.
166 *Id.* at 1102.
167 *Id.* at 1101.
168 N.Y. JUD. LAW § 2-b(3) (McKinney 2010).
169 N.Y. CONST. art. VI, § 30.
170 446 N.E.2d 764 (N.Y. 1983).
171 *Id.* at 768 ("Courts are not without authority to direct the performance of duties imposed by statute for implementation of legislative action which they have found to have been properly taken.").
172 *See* N.Y. JUD. LAW § 211(1)(b) (McKinney 2010) ("The . . . implementation of rules and orders regulating practice and procedures in the courts[are] subject to the reserved power of the legislature."); *see also* A.G. Ship Maint. Corp. v. Lezak, 503 N.E.2d 681, 684 (N.Y. 1985) ("[A]ny rules the courts adopt must be consistent with existing legislation and may be subsequently abrogated by statute . . . .").

reference a single jury.[173] The Court concluded that uses of innovative procedures are allowed as long as they are consistent with statutory, constitutional, and decisional law.[174] Navigating these three hurdles to come up with a new procedure is no easy task. The one crafted in the Bronx, however, overcame these obstacles.

Recognizing the lower court had the opportunity to craft novel procedures, the Court of Appeals next examined whether the procedure conflicted with any state statutes.[175] Article 65 is silent on witnesses other than child witnesses in the prosecution of a sex abuse crime.[176] According to the majority, because the statute "le[ft a] courts' preexisting authority unaffected," [177] judiciary discretion was implied.[178] Furthermore, the lower court judge conducted a preliminary finding, based on "clear and convincing evidence," that the well-being of the witness was in severe jeopardy.[179] This adopted standard was analogous to Article § 65.20, in which a judge must find the child witness would suffer "serious mental or emotional harm" by appearing before his or her accused in court.[180]

In his dissent, Judge Jones disagreed that the lower court's novel procedure was in line with Article 65.[181] He argued that, by writing the statute specifically on child witnesses, the legislature was clear in limiting its policy choice.[182] He said that while the Legislature specifically acknowledged the importance of insulating psychological and mental damage of a vulnerable

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173 535 N.E.2d 1336, 1337–38 (N.Y. 1989).

174 *Id.* at 1338.

175 People v. Wrotten, 923 N.E.2d 1099, 1101–02 (N.Y. 2009).

176 N.Y. CRIM. PROC. LAW §§ 65.00-65.40 (McKinney 2010).

177 *Wrotten*, 923 N.E.2d at 1102 ("'[N]othing herein shall be construed to preclude the court from exercising . . . any authority it otherwise may have to protect the well-being of a witness and the rights of the defendant.'" (citing CRIM. PROC. LAW § 65.10(3))).

178 *Id.* at 1101–02.

179 CRIM. PROC. LAW § 65.10(1) ("A child witness shall be declared vulnerable when the court, in accordance with the provisions of section 65.20, determines by *clear and convincing evidence* that it is likely that such child witness will suffer serious mental or emotional harm if required to testify at a criminal proceeding without the use of live, two-way closed-circuit television and that the use of such live, two-way closed-circuit television will diminish the likelihood or extent of, such harm.") (emphasis added).

180 CRIM. PROC. LAW § 65.20(2).

181 *Wrotten*, 923 N.E.2d at 1103-06 (Jones, J., dissenting).

182 *Id.* at 1105–06.

child, not the preservation of the health of an infirmed adult.[183] He selectively interpreted Article 65. Article § 65.10(3) provides "[n]othing herein shall be construed [sic] to preclude the court from exercising its power to close the courtroom or from exercising any authority it otherwise may have to protect the well-being of a witness . . ."[184] By overlooking this, Judge Jones ignored that the Legislature left room for judicial discretion. The judge failed to interpret the legislation as a whole.[185] It follows that since the Legislature was mindful of a judge's power to close a courtroom (Judicial Law § 3), it must have contemplated Judicial Law § 2-b (3) when drafting Article 65.

Furthermore, Judge Jones argued the Legislature "intended to exclude grants of authority under other circumstances."[186] Again, this does not add up. The Legislature knew the technology could be extended to other circumstances, yet it drafted no explicitly restraint on other uses.[187] Article 65 would have been a natural place to limit the use of VTC testimony. No such language, however, is present. Absent this limitation, the trial court was unimpeded by the Legislature. While their arguments were in the minority, Judge Jones' and Judge Smith's dissents were apropos in moving forward.[188] Each judge highlighted the need

183 *See* N.Y. CRIM. PROC. LAW § 65.10(3) (McKinney 2010).

184 *Id.* The language does not specify a "child witness," but rather indicates a "witness" in general. *Id.*

185 MCKINNEY'S CONSTR. LAWS OF N.Y., BOOK 1, STATUTES § 97, at 213-14 (McKinney 2010) [hereinafter MCKINNEY'S STATUTES] ("[a] statute or legislative act is to be construed as a whole, and *all* parts of an act are to be read and construed together to determine the legislative intent.") (emphasis added). Furthermore, the sections of a statute "must be harmonized with each other as well as with the general intent of the whole statute . . . ." MCKINNEY'S STATUTES § 98, at 220. It would appear the legislature is concerned not just with the safety of child witnesses, but with the safety of witnesses, period. *But see* MCKINNEY'S STATUTES § 74, at 154 ("A court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit; and the failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended.").

186 *Wrotten*, 923 N.E.2d at 1104–05 (Jones, J., dissenting).

187 *See* Memorandum by the Council on Children & Families, dated July 19, 1985, Bill Jacket, L. 1985, ch. 505 at 33. ("Given the substantial protections the bill would retain for the defendant, it may be possible to extend the availability of two-way closed circuit television testimony to a number of other categories of witnesses, including children of other age groups and victims of violent crimes such as rape or assault . . . . The Council urges that the Department of Law continues its inquiries into the use of video technology in the court room.").

188 In his dissent, Judge Smith argues the use of the VTC testimony is unconstitutional because it prevents the defendant's right to corporally confront

for the Legislature to explicitly address this issue.[189]

After sifting through the statutes, the Court of Appeals reached the issue of constitutionality. The court reviewed whether the use of VTC testimony infringed upon the defendant's right to face-to-face confrontation arising under the Sixth Amendment.[190] Having the state issue preserved, the Court examined the procedure at both the federal and New York level.[191] Citing *Cintron*, the majority recognized the "right[ ] [to] confrontation 'must occasionally give way to considerations of public policy and the necessities of the case.'"[192] The Court mounted a constitutional examination in two parts.

The majority first analyzed whether the procedure was necessary to further an important public policy. It concluded the policy of protecting the well-being of a witness was important enough to curtail the defendant's right to in court, face-to-face confrontation.[193] The Court, however, sidestepped explaining why the particular public policy choice of preserving the health and safety of an infirmed witnesses was so important.[194] This lack of justification was a departure from *Craig*.[195] There may be two explanations for this silence.

Firstly, the New York Court of Appeals had little to rest on. The *Wrotten* majority cited a smattering of federal and state judicial cases where VTC testimony was implemented.[196] Each case recognized the need to protect similar witnesses to Mr. Liebowitz.[197] To establish public policy, the Court of Appeals was

her witness face-to-face. *Wrotten*, 923 N.E.2d 1099, 1106–07 (Smith, J., dissenting).

189 *Wrotten*, 923 N.E.2d at 1102 (citing Maryland v. Craig, 497 U.S. 836, 850 (1990)).

190 *Id.*

191 *Id.* at 1100–01.

192 People v. Cintron, 551 N.E.2d 561, 567 (N.Y. 1990) (quoting Mattox v. United States, 156 U.S. 237, 243 (1895)).

193 *Wrotten*, 923 N.E.2d at 1101–02.

194 *Id.* at 1102–03 ("[I]f Supreme Court's findings were supported by clear and convincing evidence, *Craig's* public policy requirement is satisfied here.").

195 Maryland v. Craig, 497 U.S 836, 852–53 (1990) (discussing how the preservation of a child's mental and emotional health is important public policy).

196 *Wrotten*, 923 N.E.2d at 1103 n.3.

197 *Id*. *See e.g.* Horn v. Quarterman, 508 F.3d 306, 317–18 (5th Cir. 2007) (affirming the trial court's decision to allow the prosecution to use a two-way closed-circuit television for an ill witness); United States v. Benson, 79 F.App'x 813, 821 (6th Cir. 2003) (affirming the trial court's decision to allow the prosecution to use video conference testimony for an elderly and inform witness); United States v. Gigante, 166 F.3d 75, 79 (2d Cir. 1999) (affirming the

just in simply citing cases. Public policy can be justified, "whether found in the Constitution, the statutes or judicial records . . . ."[198] *Craig* had never, after all, specifically suggested a public policy choice had to be steeped in statutory language.[199] The Eleventh Circuit's take on *Gigante* too reflected this need to protect unavailable infirmed witnesses.[200] In *Yates*, the Eleventh Circuit recognized the preservation of the health and safety of a witness would surely reach the public policy criteria of *Craig*, had only the District Court in *Gigante* conducted a proper finding.[201]

Secondly, the timing of this novel procedural instance presupposed the establishment of statutory codes that could "attest[ ] to the widespread belief in the importance of such a public policy."[202] The Court of Appeals had pussyfooted about this policy rationale twenty years earlier in *Cintron*, even with the existence of a statute.[203] While *Craig* had explored mountains of evidence suggesting the vitality of protecting a child's emotional and mental welfare,[204] *Cintron* forwent the inquest.[205] Instead, in both *Cintron* and *Wrotten*, the Court fixated on whether the lower court conducted a proper individualized finding of necessity.[206] The Court of Appeals concluded in *Wrotten* that "if Supreme Court's findings were supported by clear and convincing evidence, *Craig's* public policy requirement [was] satisfied here."[207] While addressing the policy choice may have been uncomfortable for the Court, its shyness

trial court's decision to allow a witness "in the final stages of an inoperable, fatal cancer" to testify via two-way, closed-circuit television); Harrell v. State, 709 So. 2d 1364, 1368-71 (Fla. 1998) (affirming the trial court's decision to allow a witness in a foreign country who is unable to attend trial to testify via live satellite); State v. Sewell, 595 N.W.2d 207, 210-11, 214 (Minn. Ct. App. 1999) (affirming the trial court's decision to allow a witness under a medical restriction not to travel to testify via interactive television); Bush v. State, 193 P.3d 203, 215-16 (Wyo. 2008) (affirming the trial court's decision to allow video testimony of a witness too ill to travel to court).

198 People v. Hawkins, 51 N.E. 257, 260 (N.Y. 1898).

199 *Wrotten*, 923 N.E.2d at 1103 ("Nowhere does *Craig* suggest that it is limited to child witnesses or that a 'public policy' basis for finding necessity must be codified.").

200 *See supra* notes 111–19 and accompanying text.

201 *Id*.

202 Maryland v. Craig, 497 U.S. 836, 853 (1990) (citation omitted).

203 *Wrotten*, 923 N.E.2d at 1103.

204 *Craig*, 497 U.S. at 853–54.

205 *See* People v. Cintron, 551 N.E.2d 561, 564–65 (N.Y. 1990).

206 *Id.* at 567-68; *Wrotten*, 923 N.E.2d at 1102.

207 *Wrotten*, 923 N.E.2d at 1103.

causes a concern that protecting an infirmed and elderly witness is not important. The Court should have touched upon the State's substantial policy work already protecting the rights of the sick and elderly.[208] By not doing so, future courts might now base VTC testimony on less worthy policy choices, while still conducting procedurally legitimate pre-trial hearings.[209]

Granted, this bit of hop-scotching by the *Wrotten* majority does not mean it wrongly upheld the admission of VTC testimony. It might, however, compel judges to justify the procedure in furtherance of a host of other less critical or inapplicable public policy choices. The language of the *Wrotten* majority almost beckons for misbehavior by subtly tying a second public policy justification to the preserving the well-being of an infirmed witness. The opinion reads that "justly resolving criminal cases" is another policy worthy of prompting VTC testimony.[210] Whether this is in conjunction with protecting the well-being of an unavailable witness is up for interpretation.

In reviewing the second prong of *Craig*, the Court of Appeals next addressed whether the VTC testimony procedure was reliable.[211] While the court shied away from addressing whether two-way video accurately replicates a "face-to-face" meeting, it did hold that the reliability of the procedure passed "constitutional muster."[212] Keeping in mind that "face-to-face" confrontation is not an absolute right, the majority evaluated the reliability of the *Wrotten* procedure. The court found all "traditional indicia of reliability" to be present.[213] The lower court properly swore in Mr. Liebowitz under oath.[214] It had granted an opportunity for contemporaneous cross-examination by the defense attorney, all the while allowing the participants of the courtroom to accurately view Mr. Liebowitz's demeanor.[215]

In satisfying both the necessity prong and reliability prong, as outlined in *Craig* and *Cintron*, the Court of Appeals concluded

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[208] *See supra* note 17.

[209] *Cintron*, 551 N.E.2d at 567.

[210] *Wrotten*, 923 N.E.2d at 1103.

[211] Maryland v. Craig, 497 U.S. 836, 845 (1990) ("The central concern of the *Confrontation Clause* is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.").

[212] *Wrotten*, 923 N.E.2d at 1102–03. This was the Court of Appeals' second departure from the *Gigante* rationale.

[213] *Wrotten*, 923 N.E.2d at 1102–03.

[214] *Id.*

[215] *Id.*

the VTC testimony was constitutional.[216] It remanded the case to the appellate court and instructed a review of the pre-trial findings.[217] In doing so, the Court tightly bound the hands of the First Department. On May 27, 2010, the First Department resolved the remaining factual matter, concluding the video testimony was necessary given the proper finding of Mr. Liebowitz's frail condition.[218]

The *Wrotten* majority expanded the use of VTC testimony to include witnesses like Mr. Liebowitz. Yet, in its decision, the Court of Appeals did not appear to limit the expanded use of the testimonial technology to witnesses unable to attend court for serious health reasons. To ensure the criminal courts of New York behave constitutionally, and to continue use of this valuable procedural practice, the Legislature should step in and craft a limiting statute.

V. THE ARGUMENT FOR LEGISLATION

A statute based on *Wrotten* should be modeled on the two prongs of *Craig*. The first part, based on a finding of necessity, can announce the specific public policy aim and institute exact requirements for granting application of VTC hearing.[219] The second part, based on reliability, can ensure the method of the procedure does not disrupt the defendant's Sixth Amendment rights. To forestall abuses of *Wrotten*, the statute ought to restrict the policy aim to protect the well-being of unavailable infirmed witnesses. To do so, the statute can erect a structure for when exactly a witness is determined to be unavailabile.[220] Based on the findings in a proper hearing, the statute can grant the court authority to act as the arbiter for employing VTC.[221] Courts will not, however, maintain the discretion to decide what policy choices can propel the use of the VTC procedure.

A. Announce and Restrict a Public Policy Justification

In *Craig* and *Cintron*, the respective high courts proclaimed VTC testimony should be used only when "necessary to further

[216] *Id.*
[217] *Id.* at 1103.
[218] People v. Wrotten, 901 N.Y.S.2d 265, 266 (N.Y. App. Div. 2010).
[219] Maryland v. Craig, 497 U.S. 836, 850 (1990). *See supra* note 87 and accompanying text.
[220] *See Wrotten*, 923 N.E.2d at 1102–03.
[221] *Id.* at 1103.

an important public policy."[222] The modifier "important" should be minded when crafting a statute. For the near impenetrability of this threshold is designed to prevent aggressively intrusive "inroad[s] on the right of confrontation."[223] For nearly twenty-five years, both federal and state high courts have limited the use of the trial technology to one single instance: the interest of preserving the well-being of a witness.[224] Any extension of the VTC procedure should, therefore, be narrowly tailored to protect an analogous concern. The language by the *Wrotten* majority nearly dislodges this crucial bulkhead.[225]

While some of the language is inexact, in the end, the *Wrotten* majority promulgates a natural extension of courtroom VTC testimony. It extends use of the procedure from those in the dawn of their lives, to those in their twilight.[226] Hence, the court left intact policy interest of preserving the well-being of a witness. This neatly tailored procedural instrument merely inched forward from preserving mental and emotional well-being to now include physical well-being. Both scenarios equally justify the necessary circumvention of traditional testimony. Had the Court not allowed for this release mechanism, it would have so absolutely harmed one party in a case the state had jurisdiction over.

Again, the policy language in *Wrotten* appears to include the broader concept of *justly resolving criminal cases*.[227] The goal of *justly resolving cases* is a sweeping interest. It reaches every party and player. In fact, it is the cornerstone on which the criminal justice system rests.[228] The court should have exclusively focused on a policy interest for the at-risk witness. Prosecutors will surely be enticed to now hang newfangled policy

[222] *Craig*, 497 U.S. at 850; *see also* People v. Cintron, 551 N.E.2d 561 (N.Y. 1990).

[223] Peter Preiser, Practice Commentaries, N.Y. CRIM. PROC. LAW § 65.00 (McKinney 2010).

[224] *See supra* Part I.

[225] See *supra* notes 193–94 and accompanying text.

[226] Hubert H. Humphrey famously said "the moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; and those who are in the shadows of life, the sick, the needy and the handicapped." Hubert H. Humphrey, Speech at the Dedication of the Hubert H. Humphrey Building (Nov. 1, 1977).

[227] People v. Wrotten, 923 N.E.2d 1099 (N.Y. 2009).

[228] *See* JOSEPH J. SENNA & LARRY J. SIEGEL, INTRODUCTION TO CRIMINAL JUSTICE 282 (3d ed. 1984) ("The court process is designed to provide an open and impartial forum for deciding the justice of a particular conflict between two or more parties".).

rationalizations on this judicial interest.

In his dissent, Judge Jones raised the concern that the majority may tempt a low threshold for justifying use of VTC testimony.[229] He asked what will prevent a court from justifying the use of a VTC procedure under any number of different "policy implications?"[230] Judge Jones' concern is real. *Wrotten* may be the drawing board for jurists to concoct all sorts of new policy justifications.[231] Without legislation, there is very little to stop courts from basing use of video testimony on more fanciful arguments. Take the general well-being of a witness, for example. Is there not some emotional harm done to a complainant in having to face, say, her rapist or mugger?[232] Or more specifically, take the shop-keeper, who for financial reasons cannot close his store to travel to court and testify?[233] Is not her financial well-being at stake by having to attend trial and forego a day's or week's profit? What about the soldier who is due back in theater before the trial of her car-jacker? Is there not a strong governmental interest in the nation's defense?[234] Could the well-being of society at large, someday justify remote video testimony? To the adventurous judge, mixed policies such as "financial well-being," "national well-being," "emotional well-being," and "physical well-being" may all appear to balance atop equally sized pillars. But in the context of this testimonial procedure, they likely do not. Next, consider subversive policy justifications. How would a New York court handle the situation in *Bush v. State*?[235] In *Bush*, the Supreme Court of Wyoming ruled that a witness, having suffered a heart attack eight days before he was

[229] *Wrotten*, 923 N.E.2d at 1004-06 (Jones, J., dissenting).

[230] *Id.* at 43.

[231] See the above analysis of N.Y. JUD. LAW § 2-b(3), *supra* notes 167–74 and accompanying text.

[232] Most victims would be better off avoiding his or her assailant. *See* People v. Burton, 556 N.W.2d 201, 205–06 (Ct. App. 1996) (Allowing the 36 year old victim of gruesome rape to testify via two-way video, even though the state statute limited the procedure to child victims).

[233] *See* Staley v. Sec'y Dept. of Corrs., No. 8:06-cv-1122-T-17TGW, 2008 WL 2385488, at *7 (M.D. Fla 2008) (finding that potential financial hardship to the witness was a strong enough policy consideration to justify remote video testimony at trial).

[234] *See* United States v. Abu Ali 528 F.3d 210, 240–41 (4th Cir. 2008) (Stating that because no governmental interest is more compelling than national security, "[t]he prosecution of those bent on inflicting mass civilian causalities . . . is just the kind of important public interest contemplated by the *Craig* decision") (emphasis added).

[235] Bush v. State, 193 P.3d 203, 214 (Wyo. 2008).

scheduled to testify in court, could testify via VTC from his out-of state-home in Colorado.[236] The witness in *Bush* was likely to recover from his heart attack, albeit not in eight days.[237] It seems the VTC testimony was based on a policy choice of judicial expediency, rather than on preserving the health and well-being of the witness. Finally, what will stop judges from entertaining public policy choices that do not even focus specifically on the interests of the witness? For example, what about using VTC testimony to further the court's policy of *justly resolving cases*?[238] Would that be enough?

As highlighted by *Wrotten*, the availability of VTC testimony procedure can empower elderly crime victims. The *Wrotten* decision furthers the important policy work of protecting the geriatric population.[239] Of course, while the technology compliments these already established elder abuse laws in New York, because near death is near death at any age, the procedure should not be restricted to a particular age requirement.

Legislative restraint can assure the United States Supreme Court that New York does not intend to fall prey to the above hypotheticals. The Supreme Court announced the denial of the defendant's first petition for certiorari in early June of 2010.[240] The Court issued the denial because the New York First Department Appellate Division had not yet ruled on remand the factual issue left by the New York Court of Appeals.[241] The First Department answered the pending issue in a coinciding ruling on May 27, 2010.[242] Having the resolved this remaining matter, the defendant's second petitioned was again denied by the Supreme Court January 18, 2011.[243] This time, without justification.

In an accompanying statement in the first denial of certiorari,

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[236] *Id.* at 215–16.

[237] *Id.* at 215.

[238] See United States v. Beaman, 322 F.Supp.2d 1033, 1033–1035 (D. N.D. 2004) (allowing video testimony of expert witness who was unavailable for scheduled trial date because he had two other court appearances the same day).

[239] *See supra* note 17.

[240] Wrotten v. New York, 130 S.Ct. 2520 (2010).

[241] *Id.*

[242] People v. Wrotten, 901 N.Y.S.2d 265 (N.Y. App. Div. 2010).

[243] Shortly after Justice Sonya Sotomayor wrote her statement, but before it was issued in June of 2010, the First Department issued its final opinion on remand. Having denied final leave in August of 2010, the Court of Appeals fully considered *Wrotten*. The defendant was then free again to seek certiorari; this time without facing any jurisdictional objection. *See* New York v. Wrotten, 934 N.E.2d 905 (N.Y. 2010), *cert. denied* (Jan. 18, 2011) (No. 10-7698).

Supreme Court Justice Sonya Sotomayor stressed the importance of the issue raised in *Wrotten*, and hinted that the situation was "strikingly different" than *Craig*.[244] This is foreboding, especially when considering the comments issued by Justice Scalia in 2002 on the proposed changes to the Federal Rules of Criminal Procedure and the current disagreement among the federal courts on VTC testimony of infirmed witnesses.[245] These factors, taken together, strongly suggest the Supreme Court is ready to welcome an opportunity to resolve the questions regarding face-to-face confrontation. Given that *Coy* has not yet been overruled,[246] and the factual differences between *Wrotten* and *Craig*, the Supreme Court has a mixed arsenal to preserve or attack a *Wrotten*-like scenario, should it choose to hear such a case.

B. Instruct a Finding of Proper Necessity

Statutory law can compel courts to hold preliminary hearings to determine whether a witness is unable to travel and testify in court.[247] The *Wrotten* opinion telegraphed a need to formalize this procedure.[248] As *Wrotten* stands now, at every step of a pre-trial review, a judge can obfuscate the purpose of a hearing.[249] Furthermore, without a statute specifically outlining requirements, courts have the capacity to distort the application process.[250]

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[244] *Wrotten*, 130 S.Ct. at 2520.

[245] FED. R. CRIM. P., Statement on Advisory Comm., Amendments to Rule 26(b), 207 F.R.D. 89, 93–96 (2002) (Scalia, J.); *see also* U.S. v. Gigante, 971 F. Supp. 755, 758 (E.D.N.Y. 1997).

[246] *See* Coy v. Iowa, 487 U.S. 1012 (1988).

[247] *See* Maryland v. Craig, 497 U.S. 836, 840 (1990).

[248] "'In the absence of direction from the Legislature, Supreme Court retained discretion . . . to determine what steps, if any, could be taken to permit this prosecution to proceed notwithstanding the complaining witness's inability to be physically present in the courtroom.'" *Wrotten*, 923 N.E.2d at 1101, 1103 (quoting People v. Wrotten, 871 N.Y.S.2d 28, 47 (N.Y. App. Div. 2008) (Friedman, J., dissenting)).

[249] *Id.* at 1101.

[250] *See* Bush v. State, 193 P.3d 203, 215 (Wyo. 2008). This Wyoming case presents an interesting comparison to *Wrotten*. In it, the Supreme Court of Wyoming ruled that a witness, having suffered a heart attack eight days before he was scheduled to testify in court, could testify via VTC from his out of state home in Colorado. *Id.* at 215–16. The witness in *Bush* was not expected to recover from the heart attack for "a long time." *Id.* at 215. It seems the *Bush* testimony was based on the policy choice of judicial expediency, masked as a preservation of the health and well-being of the witness. This scenario is factually similar to *Yates*. *See generally*, United States v. Yates, 438 F.3d 1307,

Based on the language of the majority's decision, a judge is allowed to deny an application for the use of VTC by an unavailable infirmed witness.[251] This is not so with vulnerable child witness cases. Article § 65.20(1) instructs that the prosecution can always initiate such a hearing.[252] The imposition of a *Wrotten* statute will force the courts to comply. Additionally, the Legislature can ensure a hearing to rely on a "clear and convincing" threshold in determining whether the testimony procedure is necessary. [253] As it stands now, nothing can stop a court from deciding a pre-trial motion on a lower standard of findings. A court might, go the *Cintron* route, or even *Gigante*, and allow VTC testimony based on an insufficient finding of necessity. A judge might even base her decision on observation alone. [254] This and other requirements are explicitly enumerated in Article 65, but should also be applied to this new scheme.[255]

C. Ensure the Procedure is Reliable

The *Wrotten* decision left a tangle of technical issues in its wake. The Legislature ought to settle these uncertainties. By spelling out requirements, the reliability prong of *Craig* can be

1310, 1312–13, 1318 (11th Cir. 2006). The trial court in *Yates* tempted to herald a policy of witness safety, while subversively pushing a policy of judiciary expediency. This mixed issue of facts and law is different from the situation of Mr. Liebowitz in *Wrotten*. Due to his age and condition, Mr. Liebowitz's health was in a state of deterioration. People v. *Wrotten*, 923 N.E.2d 1099, 1101 (N.Y. 2009). The Bronx court would never have a chance to meet a healthy Mr. Liebowitz.

[251] *Wrotten,* 923 N.E.2d at 1101–02.

[252] "Prior to the commencement of a criminal proceeding; other than a grand jury proceeding, either party may apply to the court for an order declaring that a child witness is vulnerable." N.Y. CRIM. PROC. LAW § 65.20(1) (McKinney 2010). There appears to be no legislative equivalent for an unavailable witness. *Wrotten,* 923 N.E.2d at 1101–02.

[253] *Wrotten*, 923 N.E.2d at 1102–03.

[254] *See id.* at 1102. The trial court in *People v. Cintron,* 551 N.E.2d 561, 563 (N.Y. 1990), had Article 65 as a guideline. In *U.S. v. Gigante,* the Court of Appeals explained that the district court did, in fact, hold a hearing to determine the witness's health. 166 F.3d 75, 79–80 (2d Cir. 1999).

[255] N.Y. CRIM. PROC. LAW § 65.20(6 & 10) (McKinney 2010) (stating that although a judge may decide a child witness is suffering mental or emotional harm, upon his own decision, the court must conduct a hearing "for the purpose of making findings of fact essential to the determination of the motion."); *see also* Peter Preiser, Practice Commentaries, N.Y. CRIM. PROC. LAW § 65.20 (McKinney 2010) (in determining whether a child is vulnerable, a judge must review enough evidence that a determination may be clearly and convincingly made).

satisfied.[256] To protect the constitutionality of the procedure, the witness must give her statement under oath, must be subject to cross-examination, and the procedure must allow the jury to inspect the demeanor of the witness while testifying.[257] Statutory direction can ensure the observation of these rules.

Wrotten was silent on the technology and the specifics of handling remote location testimony.[258] Both Federal Statute § 3509 and New York Article 65 include language on how the live televised technology should be operated.[259] A New York judge cannot, however, rely on Article 65 every time she finds a use for VTC testimony of an infirmed witness. Repeatedly citing an analogous statute will create a bevy of problems, especially when a case is heard on appeal.

Legislation ought to mandate "pretrial orders that set out appropriate safeguards" to ensure reliable testimony. [260] Some of these orders can be dictated by legislation. Others can be decided by lower courts. Although not exhaustive, the five following recommendations satisfy the most pertinent constitutional requirements.

Firstly, the quality of the video transmission must be reliable and accurate.[261] It must allow the jurors to hear and see the witness testifying. The testimony must also allow the judge, attorneys and courtroom personal to see and understand each other.[262] Video transmission however, should never be reviewed by jury in deliberation, and should not be considered part of the record on appeal, "except on motion for good cause shown."[263]

Secondly, there should not be any editorializing during video transmission. Fancy angling or shot rotation is likely to create

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[256] Maryland v. Craig, 497 U.S. 836, 850 (1990).

[257] *Id.* at 845–46. These requirements fulfill the essence of the Confrontation Clause. Again, the Court in *Craig* explained face-to-face confrontation "is not the *sine qua non* of the confrontation right." *Id.* at 847.

[258] *Wrotten*, 923 N.E.2d at 1100.

[259] 18 U.S.C. § 3509 (2010); N.Y. CRIM. PROC. LAW § 65.00 (McKinney 2010).

[260] *See* Fed. Rules of Criminal Procedure, Statement on Advisory Comm., Amendments to Rule 26(b), 207 F.R.D. 89, 102 (2002) (Breyer, J.).

[261] *Craig*, 497 U.S. at 846.

[262] *See, e.g.*, *Wrotten*, 923 N.E.2d at 1102–03.; U.S. v. Gigante, 166 F.3d 75, 80 (2d Cir. 1999).

[263] Without such a provision, televised witness testimony may bias the review at an appellate level. *See* N.J. STAT. ANN. §§ 2A:84A-32.4(e) (West 2010). *But see* Keith A. Gorgos, *Lost in Transcription: Why the Video Record is Actually Verbatim*, 57 BUFF. L. REV. 1057, 1058–61 (2009) (arguing that a court record on video contains more information and is therefore more advantageous to the review process than a transcript record).

juror biases. Fixed camera shots ought to be employed for the duration of the testimony.[264] The witness's monitor may have a split screen, so that she can view the judge, jury and defense attorney.

Thirdly, legislation must account for the technical and systematic difference between VTC testimony of child witness and that of an infirmed witness. While a child witness generally testifies from a remote room within the court building,[265] an infirmed witness will likely testify from the confines of her locale. Therefore, each time an unavailable witness testifies, the video transmission technology will have to be set-up in a different location. This geographic movement presents an opportunity for mistakes and uncertainties.

Fourthly, the statute should restrict VTC testimony only to key witnesses.[266] The Court of Appeals hints at this.[267] While the majority is silent on why it would be important to make this determination, it must not want to unnecessarily subject a defendant to a lesser degree of confrontation. If the government is able to make its *prima facie* case without testimony from an infirmed witness, then a court would have less reason to disrupt the Sixth Amendment rights of the defendant.

Lastly, an officer acting as a court surrogate ought to participate at the remote location.[268] A surrogate will not only properly install the VTC device, but she can also remove distractions, ensure that the witness is not coached or pressured during testimony, and remind the witness that swearing under oath subjects her to the possible penalty for perjury.

VI. CONCLUSION

The Case of *People v. Wrotten* has extended the application of an important tool in criminal procedure law. The New York State Legislature must now take hold of this development and thoughtfully move forward by restricting VTC testimony to vulnerable children and unavailable infirmed witnesses.

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[264] The testimonial procedure outlined in *Wrotten*, provides only a cursory description of proper video transmission. *Wrotten*, 923 N.E.2d at 1101.

[265] *See* N.Y. CRIM. PROC. LAW § 65.30(1) (McKinney 2010).

[266] *Wrotten*, 923 N.E.2d at 1103.

[267] *Id.*

[268] *See* Fed. Rules of Criminal Procedure, Statement on Advisory Comm., Amendments to Rule 26(b), 207 F.R.D. 89, 100–101 (2002) (appendix to statement of Breyer, J.) (Breyer, J., dissenting).

Without a limiting statute, future application of *Wrotten* may convert the ordinary television set into a Pandora's Box of Sixth Amendment controversies.