People v. Wrotten: The Need for Statutory Regulation of the Use of Two-Way Live Video Testimony in Criminal Trials

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PEOPLE V. WROTTEN: THE NEED FOR STATUTORY REGULATION OF THE USE OF TWO-WAY LIVE VIDEO TESTIMONY IN CRIMINAL TRIALS

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INTRODUCTION

A. Two-Way, Closed-Circuit Video Testimony for Unavailable Witnesses in Criminal Trials

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [sic]."1 The Supreme Court of the United States has recognized this right as a guarantee that the defendant will have a face-to-face meeting with his or her accuser before the trier of fact, and has found this to be one of "the core [] values furthered by the Confrontation Clause."2 The New York State Constitution is no different.3 However, both the United States Supreme Court and the New York Court of Appeals have made exceptions to this guarantee of face-to-face confrontation through the use of closed-circuit, live televised testimony in certain, limited situations.4

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1 U.S. CONST. amend. VI (emphasis added).
3 See N.Y. CONST. art. I, § 6 ("In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel . . . and be confronted with the witnesses against him or her.").
4 See Maryland v. Craig, 497 U.S. 836, 857 (1990) (concluding that the Confrontation Clause does not necessarily prohibit the use of closed-circuit, live televised testimony when it is necessary to protect a child witness from trauma caused by testifying in the physical presence of the defendant); see also
In New York, most of the cases dealing with the use of this procedure involve vulnerable child sexual abuse victims as witnesses providing testimony against the accused. In fact, the use of this procedure has been codified in Article 65 of the Criminal Procedure Law. However, what happens when the witness is not a vulnerable child, but rather an elderly person who moved out of state following an assault and is no longer available to testify due to poor health? What happens when there is no statute to lay out the ground rules for using two-way, closed-circuit live television conferencing to obtain the testimony of this elderly witness? And more importantly, who should decide when this procedure should be allowed, the judiciary or the Legislature? These are the very issues that were raised in People v. Wrotten.

B. Wrotten: The Need for Statutory Regulation

In People v. Wrotten, the Court of Appeals determined that the trial court was vested with the authority, through both its inherent powers and Judiciary Law § 2-b, to fashion a procedure for, and allow the use of, two-way, closed-circuit live television to obtain the testimony of an elderly, complaining witness who could not travel to New York to testify against the defendant due to advanced age and poor health. The Court of Appeals recognized that “[t]elevised testimony requires a case-specific finding of necessity,” and that “it is an exceptional procedure to be used only in exceptional circumstances.” However, the court did not lay out any standard to be followed by trial courts in determining when this procedure can be used or what safeguards need to be in place to protect the defendant’s constitutional rights to confrontation.

People v. Cintron, 551 N.E.2d 561, 567 (N.Y. 1990) (holding that under both the United States Constitution and the New York State Constitution face-to-face confrontation with the accused is not always required).

5 See Cintron, 551 N.E.2d at 565 (discussing the use of live closed-circuit, two-way television for a five year old victim’s testimony against the accused); see also People v. Algarin, 498 N.Y.S.2d 977, 978 (N.Y. Sup. Ct. 1986) (exploring the issue of whether sexually abused child victims should be able to testify by live closed-circuit television).

6 See N.Y. CRIM. PROC. LAW § 65.10(2) (2011) (“When the court declares a child witness to be vulnerable, it shall . . . authorize the taking of the testimony of the vulnerable child witness from the testimonial room by means of live, two-way closed-circuit television.”).

7 923 N.E.2d 1099, 1100 (N.Y. 2009) (holding that permitting an elderly man to testify via live, two-way television did not violate the defendant’s confrontation rights).

8 See N.Y. JUD. LAW § 2-b (2011) (“A court of record has power . . . 3) to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it.”).

9 Wrotten, 923 N.E.2d at 1100.

10 Id. at 1103.

11 Id.
This comment will examine *People v. Wrotten* through a public policy lens. In coming to its decision in *Wrotten*, the court found that “[n]owhere does *Craig* suggest that it is limited to child witnesses or that a ‘public policy’ basis for finding necessity must be codified.” This may be true; however, there are important public policy reasons suggesting that the use of this procedure, outside of what has already been provided for through Article 65, should be codified. Included in the reasons for codification are safeguarding the confrontation rights of the defendant, protecting the well-being of the witness, streamlining standards for application of the procedure, maintaining the separation of powers between the branches of the government, and ensuring the just resolution of criminal cases.

**C. Overview**

Part I of this comment will provide background on the Confrontation Clause, and the relevant case law and statutes involving the use of live, closed-circuit video conferencing for obtaining witness testimony in both the federal judicial system and in New York. This section will also discuss the differences in using this procedure for both available and unavailable witness testimony. Part II will explore the facts and procedural history, as well as the testimonial procedure at issue in *People v. Wrotten*. Part III will identify the problems with *Wrotten’s* application of the procedure for allowing the use of two-way, closed-circuit live television testimony, and will propose legislation aimed at remedying those problems.

14. See id. at 1102 (“Live two-way video may preserve the essential safeguards of testimonial reliability;” however, it is essential that “all of the other elements of the confrontation right [be] preserved, including testimony under oath, the opportunity for contemporaneous cross-examination, and the opportunity for the judge, jury, and defendant to view the witness’s demeanor as he or she testifies.”) (internal quotation marks omitted); see also *Craig*, 497 U.S. at 845-46.
15. See *Wrotten*, 923 N.E.2d at 1103; see also *Craig*, 497 U.S. at 854.
16. See *Crawford v. Washington*, 541 U.S. 36, 63 (2004) (overruling *Ohio v. Roberts*, 448 U.S. 56 (1980), because the test set forth in *Roberts* was inconsistently applied by lower courts, and “so unpredictable that it fail[ed] to provide meaningful protection from even core confrontation violations.”); see also *Wrotten*, 923 N.E.2d at 1106 (Jones, J., dissenting) (identifying the problem of individual courts, on similar facts, reaching different conclusions as to whether to allow the admission of televised testimony).
17. See *N.Y. CONST.* art. III, § 1; see also *Bourquin v. Cuomo*, 652 N.E.2d 171, 173 (N.Y. 1995) (“The constitutional principle of separation of powers . . . requires that the Legislature make the critical policy decisions, while the executive branch’s responsibility is to implement those policies.”).
I. HISTORICAL CONTEXT

A. The Confrontation Clause

The primary object of the [Confrontation Clause] was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may . . . judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.18

The Supreme Court has recognized “two essential elements in the Confrontation Clause: (1) the right of the accused to confront the witness and (2) the right to cross-examination.”19 The text of the Confrontation Clause, however, is unclear as to whether or not actual physical confrontation is required, and Supreme Court precedent on this issue offers conflicting interpretations.20 Supreme Court cases have interpreted the Sixth Amendment’s Confrontation Clause to guarantee the defendant a face-to-face meeting with witnesses appearing before the trier of fact.21 Moreover, the Court has identified this face-to-face confrontation right as “essential to a fair trial in a criminal prosecution.”22 This right of a criminal defendant to confront accusatory witnesses serves two purposes: (1) to deter false accusations; and (2) to give the jury the opportunity to examine

20 Compare Maryland v. Craig, 497 U.S. 836, 860 (1990) (finding an exception to the face-to-face meeting guarantee), with Coy v. Iowa, 487 U.S. 1012, 1016 (1988) (stating that the Confrontation Clause guarantees the defendant a face-to-face meeting with the witness); see Matthew J. Tokson, Virtual Confrontation: Is Videoconference Testimony by an Unavailable Witness Constitutional?, 74 U. CHI. L. REV. 1581, 1581 (2007) (explaining how, on one hand, the Court has said the clause guarantees a “face-to-face” meeting with the witness, while on the other hand the Court has held that the clause does not require in-person confrontation with witnesses in all circumstances).
21 See Coy, 487 U.S. at 1016–17 (quoting Kirby v. United States, 174 U.S. 47, 55 (1899) in describing the operation of the Confrontation Clause: “a fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases”); see also Mattox, 156 U.S. at 242–43.
22 Coy, 487 U.S. at 1017 (quoting Pointer v. Texas, 380 U.S. 400, 404 (1965)). In explaining the effect face-to-face confrontation has on the integrity of the witness’ testimony, the Court recognized that “[i]t is always more difficult to tell a lie about a person ‘to his face’ than ‘behind his back.”’ Id. at 1019.
the witness as the witness accuses the defendant, and to examine the
defendant as he is being accused. This confrontation in front of the jury
allows the jurors to assess the credibility of the testimony, which is crucial
to a reliable verdict. However, the Court in Coy v. Iowa explained that
the confrontation rights guaranteed by the Sixth Amendment are not
absolute, and may give way when necessary to further an important public
policy.

B. Creating an Exception to Face-to-Face Confrontation: Child Witnesses
in Sexual Assault Cases

a. Maryland v. Craig: One-Way Closed-Circuit Testimony

The Supreme Court in Maryland v. Craig made it clear that a criminal
defendant's rights to confrontation are not absolute. The Court
established a two-prong test, now known as the "Craig Test," which
provides that a defendant's rights under the Confrontation Clause are not
violated, despite the absence of an in-person confrontation at trial, where
"denial of such confrontation is necessary to further an important public
policy and where the reliability of the testimony is otherwise assured."

In Craig, the defendant was charged with sexually assaulting a six-year-
old girl who attended the kindergarten and prekindergarten center owned
and operated by the defendant. Prior to trial, the prosecutor sought to
invoke a Maryland statutory procedure that allowed a child witness, who is
alleged to be a victim of child abuse, to testify from outside of the
courtroom via one-way closed-circuit television, which would be
transmitted into the courtroom. Under this procedure, the child witness,
prosecutor and defense counsel would be moved to a separate room, while
the judge, jury and defendant remained in the courtroom. From the

24 Chase, supra note 23, at 1011 ("The information that the jurors acquire as a result of seeing this confrontation can help them to assess the credibility of the testimony of the accusing witness which, in turn, is crucial to a just and reliable jury verdict."); see also Coy, 487 U.S. at 1019–20.
25 487 U.S. at 1012 (holding that the use of a large screen placed between the defendant and two child witnesses testifying against the defendant in a sexual assault case violated the defendant's confrontation right).
26 See Coy, 487 U.S. at 1020–21. The Court, however, did not identify what would be a legitimate exception to the right of face-to-face confrontation.
28 Id.
29 Id. at 840.
30 Id.
31 Id. at 841.
separate room, the child witness would be examined and cross-examined, while a video monitor recorded and displayed the witness’s testimony to those in the courtroom. Throughout the course of the testimony, the defendant would be in electronic communication with defense counsel, and objections would be made and ruled on as if the witness were testifying in the courtroom. During the testimony, the witness would not be able to see the defendant.

Under the Maryland statute, to allow the use of this procedure, the trial court had to “determine that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.” Expert testimony was presented explaining that the child witness would have considerable difficulty testifying in the defendant’s presence and would not be able to communicate effectively. The trial court allowed the use of the procedure, and overruled the defendant’s objection that it violated her constitutional right to confrontation.

The Supreme Court upheld the constitutionality of the Maryland statute. The Court identified four purposes of the Confrontation Clause: (1) physical presence of the witness; (2) requirement that the witness’s testimony be under oath; (3) cross-examination of the witness by defense counsel; and (4) observation of the witness’s demeanor by the jury. The Court found that despite the witness not being physically in the courtroom, the presence of the other elements of confrontation, such as being subject to rigorous adversarial testing in a manner functionally equivalent to that accorded to live, in-person testimony, adequately ensured the reliability of the testimony. Moreover, the Court recognized the compelling state interest in safeguarding the physical and psychological well-being of child abuse victims.

The Court explained that although “the Confrontation Clause reflects a preference for face-to-face confrontation at trial,” it is a preference that

32 *Id.*
34 *Id.* at 841.
35 *Id.* at 840–41 (citing MD. CODE ANN., CTS & JUD. PROC. § 9-102(a)(1)(ii) (1989)).
36 *Id.* at 842.
37 *Id.* (concluding “that although the statute ‘take[s] away the right of the defendant to be face to face with his or her accuser,’ the defendant retains the ‘essence of the right of confrontation,’ including the right to observe, cross-examine, and have the jury view the demeanor of the witness”).
38 See *id.* at 845–46; see also Chase, *supra* note 23, at 1017.
40 See *id.* at 852.
41 *Id.* at 849 (quoting Ohio v. Roberts, 448 U.S. 56, 63 (1980)).
“must occasionally give way to considerations of public policy and the necessities of an individual case.” The Court held that in order to infringe upon a defendant’s confrontation rights, there must be a case-specific showing of necessity to further an important state interest, and only where the reliability of the testimony is otherwise assured.

b. People v. Cintron: The Constitutionality of Article 65

Similar to the issue decided in Craig, in People v. Cintron the New York Court of Appeals had to determine whether Article 65 of the Criminal Procedure Law could be construed to afford the minimum protections for a criminal defendant’s confrontation rights required by both the New York and Federal Constitutions. The Article 65 procedure provides for the use of live, two-way closed-circuit television, rather than the one-way procedure at issue in Craig. Like in Craig, the Court of Appeals ruled that the right to face-to-face confrontation is not absolute under either the New York or Federal Constitution. In Cintron, the defendant was convicted of first-degree attempted sodomy and first-degree sexual abuse of a four-year-old girl. During the trial, the court issued an order pursuant to Article 65 allowing the child witness to testify from a testimonial room located outside of the courtroom.

42 Id. (quoting Mattox v. United States, 156 U.S. 237, 243 (1895)).
43 See id. at 855–56 (To meet the requisite finding of necessity the trial court must determine: (1) that the use of one-way closed-circuit television procedure is necessary to protect the welfare of the particular child witness testifying; (2) that the particular child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant; and (3) that the emotional distress suffered by the child would be more than de minimus).
44 See id. at 855; see also Crawford v. Washington, 541 U.S. 36, 59 (2004) (holding that cross-examination is required to admit prior testimonial statements of witnesses who have become unavailable for trial); see also United States v. Yates, 438 F.3d 1307, 1314 (11th Cir. 2006) (positing that “[b]ecause Defendants were denied a physical face-to-face confrontation with the witnesses against them at trial, we must ask whether the requirements of the Craig rule were satisfied, justifying an exception to the physical face-to-face confrontation requirement of the Sixth Amendment; . . . under Craig, such testimony may be offered 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”) (internal quotation marks omitted); see generally Marc Chase McAllister, Two-Way Video Trial Testimony and the Confrontation Clause: Fashioning a Better Craig Test in Light of Crawford, 34 FLA. ST. U. L. REV. 835, 836–37 (2007) (discussing the Craig reliability balancing test, and the need to replace that test with a cross-examination requirement in light of Crawford).
46 See id. at 563–64.
47 N.Y. CRIM. PROC. LAW § 65.00(4) (2011) (“‘Live, two-way closed-circuit television’ means a simultaneous transmission, by closed-circuit television, or other electronic means, between the courtroom and the testimonial room in accordance with the provisions of section 65.30.”).
49 Cintron, 551 N.E.2d at 567.
50 Id. at 563.
51 Id.
Under Article 65, in certain child sexual abuse cases, vulnerable child witnesses are permitted to testify via two-way, closed-circuit video from a room that is separate from the courtroom. In order to invoke the statute, the trial court must declare the child to be a vulnerable witness and determine by "clear and convincing evidence that it is likely, as a result of extraordinary circumstances, that such child witness will suffer severe mental or emotional harm if required to testify at a criminal proceeding without the use of live, two-way closed-circuit television;" and the court must also find "that the use of such [television procedure] will help prevent, or diminish the likelihood or extent of, such harm." For the child witness to testify outside of the presence of the defendant, in the testimonial room, there must be an additional, specific finding by the trial court that having the defendant and witness in the same room during the testimony will increase the likelihood that the vulnerable child witness will suffer severe mental or emotional harm. Moreover, the trial court may only allow the use of this procedure if it "is satisfied that the child witness is vulnerable, and that, under the facts and circumstances of the particular case, the defendant's constitutional rights to an impartial jury or of confrontation will not be impaired."

In Cintron, the Court of Appeals found that in applying the presumption of constitutionality, Article 65 was constitutional on its face, so long as C.P.L. § 65.20(10) was read in conjunction with C.P.L. § 65.10(1), which

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52 See N.Y. CRIM. PROC. LAW § 65.10(2) (2011) ("When the court declares a child witness to be vulnerable, it shall . . . authorize the taking of the testimony of the vulnerable child witness from the testimonial room by means of live, two-way closed-circuit television."); see also Cintron, 551 N.E.2d at 564 ("Article 65 . . . authorizes, in limited circumstances, the use of live two-way closed-circuit television as a method of permitting certain child witnesses to give testimony in sex crime cases from a testimonial room — a room which is separate and apart from the courtroom.").

53 Cintron, 551 N.E.2d at 564 (citing N.Y. CRIM. PROC. LAW § 65.10(1) (2011)).

54 See id. (citing N.Y. CRIM. PROC. LAW § 65.20(12) (2011)).

55 Id. at 564–65 (citing N.Y. CRIM. PROC. LAW § 65.20(11) (2011)).

56 N.Y. CRIM. PROC. LAW § 65.20(10) (2011) ("The court may consider, in determining whether there are factors which would cause the child witness to suffer serious mental or emotional harm, a finding that any one or more of the following circumstances have been established by clear and convincing evidence: (a) [t]he manner of the commission of the offense of which the defendant is accused was particularly heinous or was characterized by aggravating circumstances[;] (b) [t]he child witness is particularly young or otherwise particularly subject to psychological harm on account of a physical or mental condition which existed before the alleged commission of the offense[;] (c) [a]lleged commission of the offense[;] (d) [t]he offense or offenses charged were part of an ongoing course of conduct committed by the defendant against the child witness over an extended period of time[;] (e) [a] deadly weapon or dangerous instrument was allegedly used during the commission of the crime[;] (f) [t]he defendant has inflicted serious physical injury upon the child witness[;] (g) [a] threat, express or implied, of physical violence to the child witness or a third person if the child witness were to report the incident to any person or communicate information to or cooperate with a court, grand jury, prosecutor, police officer or peace officer concerning the incident has been made by or on behalf of the defendant[;] (h) [a] threat, express or implied, of the incarcera­tion of a parent or guardian of the child witness, the removal of the
requires a showing of vulnerability on the part of the child.\textsuperscript{57} The Court of Appeals interpreted the Supreme Court's holding in 
\textit{Coy} "as permitting the use of closed-circuit television technology where: (1) an appropriate individualized showing of necessity is made and (2) the infringement on defendant's confrontation rights is kept to a minimum."\textsuperscript{58} Under this framework, the Court of Appeals concluded that Article 65 provided sufficient limitations and safeguards to meet the minimum requirements of the New York and Federal Constitutions.\textsuperscript{59} The court found that when the statutory standards are followed precisely, including the limitations and protections, and the requirements that the technology provide all of the trial participants with an adequate opportunity to evaluate the witness's testimony, the constitutional standards can be met.\textsuperscript{60} The Court also recognized that although the statute does not specify that a hearing is required to determine the vulnerability requirement, and does not require that expert testimony be presented, the high threshold established by the statute to protect the defendant's confrontational rights will ordinarily require testimony at a hearing so the court can determine whether the individualized necessity requirement for vulnerability has been met.\textsuperscript{61}

c. Two-Way Video Testimony for Non-Child Witnesses

i. United States v. Gigante

In \textit{United States v. Gigante}, the defendant, a boss of one of the New York mafia crime families, was tried and convicted in the United States District Court for the Eastern District of New York of racketeering in...
violation of the RICO (Racketeer Influenced and Corrupt Organizations Act) statute, RICO conspiracy, conspiracy to murder, an extortion conspiracy, and a labor payoff conspiracy.62 In this case, the witness was not a vulnerable child, but rather a terminally ill, older man in the witness protection program.63 This witness was essential to the prosecution’s case; however, as he was dying of cancer, the witness could not testify in court due to his failing health.64 The defendant challenged his conviction on the ground that his Sixth Amendment right to confrontation was violated when the district court allowed a government witness to testify from an undisclosed location via two-way, closed-circuit television.65

The Second Circuit, in Gigante, was the first court to deal with the issue of two-way video conferencing outside of the child-protection context.66 The Court refused to apply the Craig test in its analysis, explaining that the Craig test only applied to one-way video testimony.67 In distinguishing Gigante from Craig, the Second Circuit held that the two-way video procedure allowed for “face-to-face confrontation” with the defendant, and that the procedure preserved all the key elements of in-court testimony.68 The Court compared the two-way video procedure with the constitutionally sound Rule 1569 for deposition testimony and argued that the video testimony provided greater constitutional protection to the defendant’s confrontation rights, and was therefore constitutionally permissible.70 The Court further held that the use of two-way video testimony was constitutional because the trial court made a finding of “exceptional circumstances” in accordance with the Rule 15 standards, which includes witness unavailability.71

62 United States v. Gigante, 166 F.3d 75, 78 (2d Cir. 1999).
63 Id. at 79.
64 Id.
65 Id.
67 See Gigante, 166 F.3d at 81 (positing that it was unnecessary to identify a particular important public policy that was advanced by allowing the witness to testify from a remote location via two-way video conferencing).
68 Id. at 80–81 (citing the constitutional elements to the right to confront an accuser: sworn witness; subject to cross-examination; having testified in full view of jury, court, and defense counsel; and testimony under the eye of the defendant).
69 See FED. R. CRIM. P. 15 (governing when deposition testimony may be taken prior to trial to preserve testimony for trial in exceptional circumstances).
70 See Gigante, 166 F.3d at 81.
71 See id.; see also FED. R. CRIM. P. 15(a)(1); and Tokson, supra note 20, at 1593.
ii. United States v. Yates

The Eleventh Circuit, in *United States v. Yates*, also dealt with the issue of allowing two-way closed-circuit television for non-child witnesses. In *Yates*, the defendants were tried for various fraud-related offenses in the Middle District of Alabama. Prior to trial, the prosecution moved to allow two witnesses in Australia to testify via live, two-way video conferencing on the grounds that they were unwilling to travel to the United States to testify and were outside of the subpoena power of the court. No hearing was held to determine the necessity of the procedure. The trial court, over the defendants' objections, granted the Government's motion, finding that the Government had asserted an "important public policy of providing the fact-finder with crucial evidence ... and that the Government also has an interest in expeditiously and justly resolving the case." The defendants were found guilty, and appealed on the ground that the use of the two-way video testimony violated their confrontation rights under the Sixth Amendment.

On appeal, the Eleventh Circuit rejected the Government's argument that the standard applied in *Gigante* should be followed, and found that *Craig* supplied the proper test for the admissibility of two-way videoconference testimony. The court noted, "[t]he Second Circuit stands alone in its refusal to apply *Craig*." The Eleventh Circuit also rejected the Government's argument that the admission of video testimony is within the inherent powers of the trial courts. In applying *Craig* to the facts of *Yates*, the Eleventh Circuit reasoned that although there is an important Government interest in presenting the fact-finder with crucial evidence, the need for testimony via videoconference to prove a case and expeditiously resolve it is not the type of public policy that is important enough to

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72 438 F.3d 1307 (11th Cir. 2006).
73 Id. at 1309.
74 Id. at 1309–10.
75 Id. at 1310. The Eleventh Circuit noted that the trial court allowed the use of the procedure based only on the Government's assertions that the Australian witnesses would not travel to the United States for trial. Id. at 1315-16.
76 Id. at 1315.
77 Id. at 1310.
78 *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006).
79 See id. at 1313. The Eleventh Circuit went on to explain that had the district court in *Gigante* applied the *Craig* test, "its necessity standard likely would have been satisfied; to keep the witness safe and preserve the health of both the witness and the defendant, it was necessary to devise a method of testimony other than live, in-court testimony and other than a Rule 15 deposition." Id.
80 Id. at 1313–14.
81 See id. at 1314–15.
outweigh the defendant’s rights to confrontation, especially when the Rule 15 deposition procedure is available. The court found that the trial court made no case-specific findings of necessity, other than that the Government would find it convenient to present testimony via two-way videoconference.

II. CASE HISTORY OF PEOPLE v. WROTTEN

A. Pre-Trial and Trial

In People v. Wrotten, the defendant was indicted for assault in the first degree and two counts of robbery in the first degree. The defendant was a home health aide who briefly cared for the complainant’s wife until the wife moved into a nursing home. The defendant maintained a relationship with the couple, and two and one-half months after the wife moved into the nursing home, the defendant went to the complainant’s house. Both the defendant and the complainant testified that the defendant helped the complainant prepare snacks to bring to the complainant’s wife. An altercation occurred, although the testimony regarding the altercation differed drastically between the complainant and defendant. The complainant testified that the defendant hit him on the back of his head with a hammer, and then demanded, and took, money from him before leaving the house. The defendant testified that the complainant grabbed her breasts, and that to get his hands off her, she grabbed something and hit him with it. The defendant denied demanding, or taking, any money from the complainant.

After the incident, but before trial, the complainant moved to

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82 See id. at 1316.
83 See id. (reasoning “[i]f we were to approve introduction of testimony in this manner, on this record, every prosecutor wishing to present testimony from a witness overseas would argue that providing crucial prosecution evidence and resolving the case expeditiously are important public policies that support the admission of testimony by two-way video conference”); see also Lynn Helland, Remote Testimony - A Prosecutor’s Perspective, 35 U. Mich. J.L. REFORM 719, 747 (2002) (arguing that two-way video testimony is efficient and necessary in the prosecution of international crime, which often requires the testimony of foreign witnesses).
85 Id.
86 Id.
87 Id.
88 Id.
89 Id.
91 Id.
California. Pre-trial, the prosecution moved to have the complainant testify on commission under CPL § 680.20. In the Bronx County Supreme Court, Justice Barrett denied the People's motion on the ground that the examination on commission procedure was only available upon defense application. However, Justice Barrett granted the People's application for a conditional examination under C.P.L. § 660.20. The conditional examination, however, was not possible either, because the examination was required to be conducted in New York, and the complainant was unable to travel. Thus, the People suggested that the conditional examination be done in New York via real-time two-way video transmission of the complainant's testimony from California. Justice Barrett denied the People's application to conduct and record the examination pre-trial, but decided that the two-way testimony would be allowed if given live at trial. Justice Barrett reasoned that the procedure would pass both prongs of the Craig test, and recognized that there was already a similar procedure in place under Article 65. He also determined that although Article 660 required that the proceeding be conducted in New York, it was silent as to the physical location of the participants. Furthermore, Justice Barrett determined that the trial court had the inherent power, under Judiciary Law § 2-b(3), to create a procedure such as this to ensure the integrity of the trial and because the only alternative to allowing the televised testimony would be the dismissal of the charges against the defendant. A hearing was ordered to determine whether the People could prove, by clear and convincing evidence, that there was a factual necessity to permit the use of live, two-way televised testimony of the complainant.

The hearing was held in the Bronx County Supreme Court before Justice Silverman. Both the prosecution and the defense offered expert
testimony regarding whether the complainant was physically capable of flying from California to New York to testify at trial.\textsuperscript{104} Justice Silverman determined that the People had established by clear and convincing evidence that the complainant was unable to travel to New York – the complainant was eighty-five years old, frail, unsteady on his feet, and had a history of coronary disease – without seriously endangering his health, and thus, found that the complainant was unable to testify live in New York.\textsuperscript{105} Accordingly, the court permitted the People to present the complainant’s testimony via live, two-way television conference from a courtroom in California.\textsuperscript{106} The complainant’s daughter accompanied him as he testified from California, and she was in the courtroom during his testimony.\textsuperscript{107} An employee of the company providing the two-way video equipment was also present to assist with technical matters.\textsuperscript{108} As a result, the complainant gave live, televised testimony, while physically in California.\textsuperscript{109} The complainant could see the courtroom, including the Judge and the defendant, although the extent to which he could see the courtroom participants was in dispute, and he could hear the proceedings in the courtroom.\textsuperscript{110} Those in the courtroom in New York could see and hear the complainant.\textsuperscript{111} Ultimately, the defendant was convicted of one count of assault in the second degree.\textsuperscript{112}

\textit{B. Supreme Court, Appellate Division, First Department}

On appeal, the defendant’s main argument was that the Supreme Court erred in permitting the complainant to give televised testimony.\textsuperscript{113} The Appellate Division, First Department, held that the trial court did not have the authority to allow the use of the two-way televised testimony procedure in light of the legislative intent behind allowing the procedure under Article 65.\textsuperscript{114} The court reasoned that the Legislature crafted Article 65 to allow the use of two-way video testimony in only the narrow circumstances

\begin{enumerate}
\item\textsuperscript{104} Id. at 7–12.
\item\textsuperscript{105} People v. Wrotten, 923 N.E.2d 1099, 1101 (N.Y. 2009).
\item\textsuperscript{106} Id.
\item\textsuperscript{107} Brief for Defendant-Respondent at 7–8, People v. Wrotten, 923 N.E.2d 1099 (N.Y. Aug. 28, 2009) (No. 0199-09).
\item\textsuperscript{108} Id. at 8.
\item\textsuperscript{110} Id.
\item\textsuperscript{111} Id.
\item\textsuperscript{112} Id.
\item\textsuperscript{113} Id. at 29–30.
\item\textsuperscript{114} See id. at 31.
\end{enumerate}
prescribed by the statute for vulnerable child sexual assault witnesses.\textsuperscript{115} According to the First Department, the facts and circumstances in \textit{Wrotten} made it distinguishable from \textit{Craig} and \textit{Cintron} because in the latter cases the abridgement of the defendants’ rights to confrontation was authorized by statutes reflecting the Legislature’s critical public policy choices.\textsuperscript{116} The Appellate Division also found the trial court’s reliance on § 2-b(3) of the Judiciary Law to be misplaced.\textsuperscript{117} It determined “that the scope of the Judiciary’s inherent powers must be appraised in the context of a constitution providing that ‘[t]he legislative power of this state shall be vested in the senate and assembly.’”\textsuperscript{118} Moreover, the appellate court reasoned that to allow the trial court to make critical policy decisions would violate the constitutional principle of separation of powers.\textsuperscript{119}

The Appellate Division next discussed Wrotten’s claim that the procedure violated her constitutional right to confront the witness testifying against her. Although the court did not decide the case on federal constitutional grounds, it did opine that the defendant was denied a valuable component of her Sixth Amendment right to confrontation.\textsuperscript{120} The court explained, “[i]n our judgment, in the absence of express legislative authorization, depriving defendant of a face-to-face meeting with her principle accuser – indeed, the person whose testimony was necessary for the prosecution to make out a prima facie case – tainted the fairness of the trial.”\textsuperscript{121} The Appellate Division reversed the defendant’s conviction and remanded the case for a new trial.\textsuperscript{122}

\textbf{C. Court of Appeals}

The Court of Appeals reversed.\textsuperscript{123} It held that Judiciary Law § 2-b(3) gave the Supreme Court the authority to utilize the procedures as “necessary to carry into effect the powers and jurisdiction possessed by [it],” and thus, fashion a procedure to allow the use of two-way, closed-circuit television conferencing for testimony of an unavailable witness.\textsuperscript{124}

\begin{thebibliography}{99}
\bibitem{116} See \textit{id.}
\bibitem{117} \textit{id.} at 34.
\bibitem{118} \textit{id.} at 36 (quoting N.Y. CONST. art. III, § 1).
\bibitem{119} See \textit{id.} at 38; \textit{see also} Bourquin v. Cuomo, 652 N.E.2d 171, 173 (N.Y. 1995) (discussing how the principle of separation of powers requires the Legislature to make policy decisions).
\bibitem{120} \textit{Wrotten}, 871 N.Y.S.2d at 43–44.
\bibitem{121} \textit{id.} at 44.
\bibitem{122} \textit{id.}
\bibitem{123} \textit{People v. Wrotten}, 923 N.E.2d 1099, 1103 (N.Y. 2009).
\bibitem{124} \textit{id.} at 1101 (quoting N.Y. JUD. LAW § 2-b (2011)).
\end{thebibliography}
The Court reasoned that by enacting Judiciary Law § 2-b(3), the Legislature explicitly authorized the courts’ use of innovative procedures, and held that courts may fashion necessary procedures consistent with constitutional, statutory, and judicial law. The Court held that there is no specific statutory authority expressly indicating legislative policy that would forbid a trial court from fashioning such a procedure. The Court also found that none of the statutes that provide for the preservation of pre-trial testimony implicitly precluded the use of live video testimony during trial. Since the New York Criminal Procedure Law does not enumerate the exclusive instances when two-way, closed-circuit live televised testimony can be used, the Court explained that the trial courts are not precluded from “exercising [their] authority to utilize necessary, extrastatutory procedures.” Quoting the Appellate Division’s dissent, the court stated, “[i]n 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.”

Furthermore, the Court of Appeals held that the use of this procedure under the circumstances did not violate the defendant’s constitutional rights to confrontation. Basing its reasoning on the holding in Cintron, the court explained that the authorization and use of the two-way, closed-circuit television in this case would pass the Craig test so long as there were findings of necessity and reliability made by the trial court. So

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125 See id.; see also People v. Ricardo B., 535 N.E.2d 1336, 1337-1338 (N.Y. 1989) (stating that a trial court has the authority to empanel two juries, despite clear statutory references to a single jury and no statutory authorization for multiple juries).

126 See Wrotten, 923 N.E.2d at 1101.


128 See Wrotten, 923 N.E.2d 1099, 1102.

129 Id.

130 Id. at 1103 (quoting People v. Wrotten, 871 N.Y.S.2d 28, 47 (N.Y. App. Div. 2008)); see generally Marc Bloustein, A Short History of the New York State Court System, in SEMINAR ON THE UNIFIED COURT SYSTEM OF THE STATE OF NEW YORK (1985). At the Constitutional Convention of 1846, the Supreme Court became the first statewide court of complete and original jurisdiction in New York. Lesser trial courts, with limited subject matter and geographical jurisdiction, were given constitutional status at the same time. It was not until 1962 that the Judiciary Article was added to the New York State Constitution, elaborating on the structure of the court system, but still remaining somewhat vague and open-ended with respect to its basic grant of authority. This is significant because the Supreme Court has enjoyed broad historical powers since before the creation of the Judiciary Law. Considering this history, there remains an unaddressed question of whether the Court of Appeals would have acknowledged such a broad discretionary power if this ad hoc procedure had originated in a lesser trial court, such as the New York City Criminal Court, rather than in the Supreme Court.

131 See Wrotten, 923 N.E.2d at 1101.

132 See id. at 1102.
long as the trial court’s finding of necessity was supported by clear and convincing evidence, the first prong of the Craig test would be satisfied.133

With respect to the public policy prong, the Court opined that two-way video testimony can be used to protect the well-being of a witness who cannot physically travel to New York to testify in court, while at the same time satisfying the public policy of justly resolving criminal cases where, as here, the defendant’s confrontation rights have been minimally impaired.134 Moreover, the Court determined that the second prong of the Craig test was satisfied, since “all the other elements of the confrontation right” were preserved.135 It found that the traditional indicia of reliability for testimony in this case were all present, in that the testimony was given under oath, there was opportunity for contemporaneous cross-examination, and the judge, jury and defendant had the opportunity to view the witness’s demeanor as he testified.136

Judge Jones, in his dissent, stated, “[i]n the absence of any express legislative authorization, the trial court here lacked the inherent authority to permit the complainant to testify from California via live two-way television.”137 He argued, much like the Appellate Division majority, that because the Legislature created Article 65 with “painstaking detail” to allow the use of this procedure in narrowly tailored circumstances, Judiciary Law § 2-b(3) cannot be interpreted as a grant of authority for the trial courts to allow such testimony.138 Judge Jones questioned the majority’s holding because if the trial courts had the inherent authority to authorize the use of two-way, closed-circuit televised testimony on an ad hoc basis outside of Article 65, then “there would have been no need for the Legislature to enact Article 65 in the first place.”139

Judge Jones went on to attack the majority’s decision based on the first prong of the Craig test, in that if allowing such testimony furthered an important public policy, then the majority overstepped its boundaries by making a policy decision that the Legislature had not yet made.140 In sum, Judge Jones identified three main problems with the majority’s view of the courts’ inherent powers: (1) there are no limitations set on the courts’

133 See id. ("Nowhere does Craig suggest that it is limited to child witnesses or that a ‘public policy’ basis for finding necessity must be codified.").

134 See id. at 1103.

135 See id. at 1102.

136 See id.


138 See id. at 1105.

139 Id. at 1105.

140 See id.
inherent power to allow the use of this procedure; (2) there is no standard for the courts to apply, thus leaving open the possibility for individual courts, on similar facts, to reach different conclusions about when this procedure can be used; and (3) there is an invasion of the constitutional province of the Legislature to determine what is an important public policy and to create rules.141

Judge Smith joined Judge Jones's dissent, but wrote separately to address the Confrontation Clause issue.142 He found that the defendant was denied her constitutional right to confrontation, and that there was no adequate excuse for the denial.143 Rejecting the holding in Gigante, Judge Smith concluded that the defendant was denied her right to "confront" her accuser, finding that two-way television did not satisfy the face-to-face aspect of the Confrontation Clause.144 Moreover, he distinguished Wrotten from Craig and Cintron, concluding that the public policy of protecting child victims in sexual assault cases is a much more compelling reason for allowing an exception to the right of confrontation than the facts in Wrotten.145 Judge Smith further noted that there were several other ways to conduct the hearing to avoid a constitutional violation of the defendant’s right to confrontation, regardless of whether those options were available under New York’s current statutory scheme146

III. THE USE OF TWO-WAY, CLOSED-CIRCUIT TELEVISION NEEDS TO BE STATUTORILY REGULATED.

In light of the decision by the Court of Appeals in Wrotten, there needs to be a legislative response that considers the public policy concerns of both the prosecution and the defense in a case with facts and circumstances such as were present here. Legislation is necessary to control how and when the procedure of allowing two-way, closed-circuit televised testimony from an unavailable witness can, and should, be used outside of the Article 65 setting. Moreover, the Legislature must create statutory standards to ensure the procedure’s consistent application, and that it passes constitutional muster on both the state and federal levels. This statute

141 See id. at 1106.
143 See id.
144 See id.
145 See id. at 1107.
146 See id. (suggesting that instead of bringing the witness to New York, the defendant could have been brought to California and the deposition or conditional examination of the witness could have taken place in California with the defendant present).
would basically function as an extension and combination of Articles 65, 660, and 680 of the Criminal Procedure Law.

A. Invoking the Procedure

The use of two-way, closed-circuit live televised testimony during trial should be available to both the prosecution and the defense. To invoke the procedure on either side, there needs to be a showing of reasonable cause to believe that the witness possesses information material to the criminal proceeding. Requiring the party requesting the procedure to meet this requirement will ensure that both the time and resources of the court and parties are used efficiently. Allowing the prosecution to invoke the procedure furthers the important public policy interest of providing the fact finder with all of the crucial evidence in the criminal proceeding, as discussed further below. The statute should also allow a defendant to invoke the procedure when needed, as it is important that this procedure not function to deprive a criminal defendant of his or her due process rights. If a defense witness possesses exculpatory evidence, the defendant must have an opportunity, equal to that of the prosecution, to present the witness’s testimony to the trier of fact. Although the court in Wrotten allowed the procedure to be used by the prosecution based on the facts and circumstances of the case, even though there was no express statutory authority for it, the Legislature should develop a statute that would explicitly make this procedure available to both the prosecution and the defense.

B. Passing the Craig Test

"The constitutional principle of separation of powers . . . requires that the Legislature make the critical policy decisions . . ." Under this principle, it is the role of the Legislature to determine what the important public

147 N.Y. CRIM. PROC. LAW §§ 65.00-65.30 (2011).
150 See § 660.20; see also People v. Wrotten, 871 N.Y.S.2d 28, 42 (N.Y. App. Div. 2008) ("Under article 660, either party may obtain an order directing the examination of a witness conditionally if the witness possesses information material to the criminal action or proceeding . . . ") (internal quotation marks omitted).
151 See § 680.10; see also People v. Carter, 333 N.E.2d 177, 180 (N.Y. 1975) (limiting the defendant’s right to utilize examination on commission to “exceptional circumstances” because it infringes upon the fact finder’s ability to observe witness demeanor).
152 See generally People v. Wrotten, 923 N.E.2d 1099 (N.Y. 2009).
policies are, and for the Judiciary to decide if those public policies are compelling enough to pass the first prong of the Craig test. Based on the facts and circumstances provided in Wrotten, the Government had an important interest in providing the finder of fact with crucial evidence, and also an important public policy interest in keeping witnesses safe. Similar to the important interest in protecting the mental health and wellbeing of a vulnerable child, there is also an important policy interest in not subjecting elderly or extremely ill adults, who have been the victims of crimes, to the risk of serious physical injury, or even death, just to have their testimony heard. In light of these important policy interests, the Court of Appeals correctly decided Wrotten under Judiciary Law § 2-b(3). However, the Legislature must structure the statute so that the second prong of the Craig test could be met by assuring the reliability of the testimony, despite the lack of actual, in-person confrontation. In this regard, the Court of Appeals came up short by merely affirming the inherent powers of the trial courts to fashion such a procedure. It is not enough to say “[t]elevised testimony requires a case-specific finding of necessity; it is an exceptional procedure to be used only in exceptional circumstances,”154 because it leaves the trial courts with no clear standard to follow and increases the risk that the procedure will be applied inconsistently throughout the state.

If the Legislature determines, as this comment urges it should, that there is an important public policy interest achieved by allowing extremely ill witnesses to testify, out-of-state, via live two-way video conferencing because travelling to New York to testify would place them in serious physical peril, then the Legislature must create a standard to be followed by all courts that would properly safeguard a defendant’s rights by assuring reliable testimony. In allowing the trial courts to fashion such a procedure on an ad hoc basis, the Court of Appeals decision in Wrotten may result in unconstitutional violations of a defendant’s right to confrontation. Procedures that involve risks to a defendant’s constitutional rights need to be standardized and consistent so that a defendant in one court will receive the same procedural safeguards as a defendant in another court; protections that creating procedures on an ad hoc basis does not provide. Moreover, this procedure, because it involves the curtailment of defendants’ rights, needs to be narrowly tailored to achieve a specific public policy interest. By creating a clearly defined statute with rules, standards, and a uniform procedure, the Legislature would essentially address the potential problems

154 Wrotten, 923 N.E.2d at 1103.
highlighted by Judge Jones in his dissent. The statute should not allow a trial court to determine that two-way closed-circuit video testimony may be used simply because the witness is unavailable or out of the reach of the court’s jurisdiction.

C. Hearing Requirement

It is necessary for the Legislature to require that a hearing be held, either prior to trial or at the time the issue arises, to determine if two-way closed-circuit video testimony is necessary. This determination should be based on whether or not the witness would potentially suffer serious physical or emotional injury, serious detriment to health, or death if required to travel to testify. The standard of proof in making this determination should be clear and convincing evidence, with the burden of proof resting on the party seeking to invoke the procedure. If this standard cannot be satisfied, the use of live, two-way, closed-circuit televised conferencing should not be allowed to obtain the testimony of the witness.

D. Requirement for an Official of the New York Courts to Be Present at the Time the Testimony Is Given

One of the biggest problems with the procedure used in Wrotten was that it did not provide for any official of the New York courts system to be present in the courtroom with the complainant while he was testifying.

155 Id. at 1106 (Jones, J., dissenting) ("[T]he majority’s view of the courts’ inherent powers presents a number of problems. First, there does not appear to be any discernible limitation, within the inherent powers of the courts, on a court’s authority to allow the admission of an absent witness’s televised testimony as long as it is ‘necessary to carry into effect the powers and jurisdiction possessed by [the court] . . . ‘. Second, what happens when individual courts, on similar facts, reach different conclusions as to whether to allow the admission of televised testimony or some other subject pertaining to the State’s public policy? Third, it appears that the majority’s ruling effectively circumscribes the Legislature’s role by allowing trial courts to (a) determine issues with public policy implications on a case by case basis and (b) create procedural rules for the sole purpose of allowing prosecutions to proceed (in direct contravention to state law.).") (citation omitted).

156 See United States v. Yates, 438 F.3d 1307, 1315–16 (11th Cir. 2006) (finding that the Australian witnesses’ unwillingness to travel to the United States for trial was not a sufficient reason to permit those witnesses to testify by two-way video conference); see also Wrotten, 923 N.E.2d at 1103 (noting that "[t]elevised testimony requires a case-specific finding of necessity; it is an exceptional procedure to be used only in exceptional circumstances").

157 See People v. Wrotten, 871 N.Y.S.2d 28, 29 (App. Div. 2008) (The trial judge held a hearing using the clear and convincing evidence standard.); see also N.Y. CRIM PROC. LAW § 65.10(1) (2011) (This statute applies a clear and convincing evidence standard in establishing whether a “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 . . . .").

158 Wrotten, 871 N.Y.S.2d at 32. The defendant objected that no New York court attorney or any other New York judicial official was present in the room in California to supervise the proceedings and make sure that the witness was not improperly communicating with anyone during the televised
By not having a New York court official present, there is no way of knowing whether the procedures required by the statute are properly adhered to, and this may put into question whether the defendant’s constitutional rights are truly being protected. The Legislature should require that either a Deputy Clerk or a Law Secretary be present in the courtroom with the witness, to act as an additional safeguard preventing the witness from being coached or coerced during the examinations. It is important that the New York official be a member of the bar because of the ethical responsibilities imposed on attorneys, which will further help to ensure a fair proceeding.159 Thus, the statute should include a provision that requires a court official to travel to the location where the witness will be testifying, and the expense of this additional safeguard should fall on the party invoking the procedure.160

In addition to having a New York official present, there should be a defined procedure with regard to who can administer the oath to the witness. C.P.L. § 680.60 provides the rules for establishing a commission to obtain out of state testimony from a witness, who may serve on the commission, and who may administer the oath.161 The Legislature should establish a similar procedure to address who may administer the oath when out-of-state, live-televised testimony is obtained. Furthermore, having the court subscribe the names and addresses of the witnesses, the name of the person or persons authorized to administer the oath, and a statement authorizing said person or persons to do so keeps the record clean and increases accountability for the procedures of obtaining the testimony.162

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159 See N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.01(1.15) (2011) (Lawyers who violate the rules of professional conduct face sanctions and penalties, which include the possibility of disbarment); see also In re Friedman, 609 N.Y.S.2d 578, 587 (N.Y. App. Div. 1994). The court disbarred an attorney for soliciting and requesting a witness to give false testimony at a trial and standing by when another witness gave material false testimony which the attorney knew to be false. Id.

160 Cf. FED. R. CRIM. P. 15. Rule 15 provides for the procedures governing pre-trial depositions. Id. Particularly, subsection (d) explains the procedures for expenses when the rule is invoked. Subsection (d) provides: “If the deposition was requested by the government, the court may—or if the defendant is unable to bear the deposition expenses, the court must—order the government to pay: (1) any reasonable travel and subsistence expenses of the defendant and the defendant’s attorney to attend the deposition; and (2) the costs of the deposition transcript.” Id.

161 See N.Y. CRIM. PROC. LAW § 680.60 (2011).

162 Cf. id. (requiring the court to subscribe to the name and address of each witness, the name of commissioners authorized to conduct the examination, and a statement authorizing the commissioners to administer an oath to witnesses).
E. Technological Requirements

Additionally, a provision similar to C.P.L. § 65.30(4)\textsuperscript{163} should be included to ensure that a criminal defendant's constitutional rights are protected. In \textit{Wrotten}, for example, there was a factual dispute as to the extent to which the witness could see the courtroom participants during the testimony.\textsuperscript{164} Unless the live, two-way, closed-circuit television equipment can provide clear transmission of the proceedings in both the courtroom and the testimonial location, the testimony should not be allowed. Moreover, a requirement that the live feed be recorded on videotape and introduced into the record would allow an appellate court to review it if a claim concerning the testimony were raised on appeal, as was the case in \textit{Wrotten}. By having a recording of the live feed as part of the record on appeal, the appellate court would be better able to determine if the defendant's confrontational rights were in fact violated.

CONCLUSION

In light of the changing times and advancements in technology, it is not surprising that the criminal justice system and its procedures are also changing. The use of two-way, closed-circuit live televised testimony during criminal trials is a prime example of employing those advancements in the pursuit of justice. If statutorily regulated, the procedure is an effective method for presenting unavailable witness testimony during trial since it allows the trier of fact to see the witness as examinations are conducted and determine whether or not the witness is credible.

By enacting a statute that delineates the procedures and requirements that must be met before allowing the use of two-way, closed-circuit television to obtain the testimony of unavailable witnesses, the constitutional right to confrontation can be satisfied. Furthermore, a statute would ensure that the procedure used would be fair and consistent throughout the courts. It would further serve to ensure that the prosecution would be able to present evidence before the trier of fact under circumstances that would normally result in dismissal, while still ensuring

\textsuperscript{163} N.Y. CRIM. PROC. LAW § 65.30(4) (2011) ("Notwithstanding any provision of this article, if the court in a particular case involving a vulnerable child witness determines that there is no live, two-way closed-circuit television equipment available in the court or another court in the county or which can be transported to the court from another county or that such equipment, if available, is technologically inadequate to protect the constitutional rights of the defendant, it shall not permit the use of the closed-circuit television procedures authorized by this article.") (emphasis added).

that defendants' rights are protected, regardless of where in New York their trials take place. Moreover, it would reduce the need for the trial courts to make critical policy determinations, which are better left in the hands of the Legislature.