HOLDING A VIRTUAL FACT-FINDING HEARING OVER RESPONDENT'S OBJECTION WOULD (1) VIOLATE THE STRICT REQUIREMENT IN FAMILY COURT ACT § 341.2 THAT RESPONDENT, AND HIS OR HER PARENT AND COUNSEL, BE PERSONALLY PRESENT AT THE HEARING; AND (2) WOULD VIOLATE RESPONDENT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS OF CONFRONTATION BECAUSE THERE IS NO IMPORTANT STATE INTEREST SERVED BY CONDUCTING A VIRTUAL HEARING AT THIS TIME, AND, IN FACT, THE STATE'S INTEREST IN SEEKING JUSTICE, OBTAINING AN ACCURATE AND JUST VERDICT AND AVOIDING A CONSTITUTIONALLY DEFECTIVE HEARING, AND RESPONDENT'S RIGHTS OF CONFRONTATION, TO EFFECTIVE ASSISTANCE OF COUNSEL, TO PRESENT A DEFENSE, AND TO A FAIR TRIAL, ALL MILITATE IN FAVOR OF WAITING UNTIL AN IN-PERSON HEARING CAN BE HELD

Introduction

This court has no authority to proceed to a virtual fact-finding hearing in this juvenile delinquency proceeding. In fact, Family Court Act § 341.2 forbids it. The Federal and State Constitutions also forbid it. Even in the case of a single prosecution witness whose testimony comprises only part of a larger hearing process, the landmark cases generally preclude a trial court from employing a procedure that limits in any way the accused's constitutional right to confront and cross-examine the witness *in person and face-to-face*. The only time the court may consider doing so is when: (1) there is an individualized showing that limitation of the accused's rights is necessary in order to further an important State public policy interest; (2) there is no available alternative; and (3) the infringement of the accused's confrontation rights is kept to a minimum and the reliability of the testimony is otherwise assured.

Here, respondent faces something completely different in kind from a limitation on the right to confront a single prosecution witness. The court is contemplating a full virtual hearing, authorized neither by case law nor by statute, at which respondent will have face-to-face contact with no one, including the attorney for the child. The State's desire to address a COVID-19-related backlog of cases falls far short of the important State interest required by the Federal and State Constitutions and the case law. The court needs to wait until an in-person hearing can be held..

Conducting a Virtual Hearing In This Case Would Violate The Requirement in Family Court Act § 341.2 That The Respondent, and His or Her Counsel and Parent, Are Personally Present At The Hearing

There is no statutory or appellate authority permitting this court to conduct an entire virtual fact-finding hearing over the respondent's objection. Period. *Matter of Cheryl P.*, 175 A.D.3d 1298, 1301 (2d Dept. 2019) (respondent appeared telephonically "even though there is no provision under article 3 of the Family Court Act authorizing the appearance by telephone of a minor in a juvenile delinquency proceeding").

In fact, the only applicable statutory authority expressly forbids it. The respondent and his or her counsel shall be personally present, and the respondent's parent or other person responsible for his or her care also shall be present, at any hearing under FCA Article Three. FCA § 341.2(1),(3); *see also* Criminal Procedure Law § 182.20(1) (court, in its discretion, may dispense with personal appearance of defendant, except an appearance at a hearing or trial").

There are no exceptions in the statute. None. Unlike many other statutes, § 341.2 contains no exceptions based on a showing of good cause, or exceptional or special circumstances. In fact, proceeding in violation of the parental notification and presence requirement constitutes *per se* reversible error. *Matter of Cheryl P.*, 175 A.D.3d at 1301; *In re Nikim M.*, 144 A.D.3d 424 (1st Dept. 2016). Accordingly, it goes without saying that proceeding without respondent being personally present is prohibited.

The Federal and State Constitutional Confrontation Clauses Require In-Person, Face-to-Face Confrontation With Prosecution Witnesses

There are few constitutional rights that are as clear-cut, and resistant to tampering or compromise, than the right of confrontation. The accused is guaranteed a "face-to-face" meeting with witnesses appearing before the trier of fact.

There is "something deep in human nature" that regards face-to-face confrontation between accused and accuser as essential to a fair trial. The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it. A witness may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. It is always more difficult to tell a lie about a person "to his face" than "behind his back." *Coy v. Iowa*, 487 U.S. 1012, 1017-19 (1988).

Given these human feelings regarding what is necessary for fairness, the right of confrontation contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails, and serves much the same purpose as the right to cross-examine the accuser; both ensure the integrity of the fact-finding process. *Coy*, 487 U.S. at 1018-20.

In *Coy*, the Supreme Court concluded that the defendant's Sixth Amendment right of confrontation was violated during a child sex abuse prosecution when a screen was placed between the defendant and the two complaining witnesses. "It is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter." 487 U.S. at 1020; *see also People v. Tuck*, 75 N.Y.2d 778, 779 (1989)

(there was error, albeit harmless, where a seven-year-old witness faced away from the defendant and towards the jury so her testimony would be audible).

Only In Extraordinary Cases Have Courts Limited The Accused's Constitutional Right to In-Person, Face-to-Face Confrontation, and, In Those Cases, Only With Respect to Particular Witnesses Who Require Protection, Not For the Entire Hearing

Coy left open the question of whether and when the strict right to in-person, face-to-face confrontation may be compromised. But the court did note that even if there can be exceptions, they are allowable only when necessary to further an important public policy. Although the State maintained in *Coy* that necessity was established by a statute which created a legislatively imposed presumption of trauma, the court concluded that something more than the type of generalized finding underlying such a statute was needed. The court also noted that although face-to-face presence may, unfortunately, upset a truthful rape victim or abused child, constitutional protections have costs. 487 U.S. at 1021.

Appellate cases since *Coy* have permitted deviation from the strict in-person, face-to-face confrontation requirement only in narrow circumstances, and no court has allowed an entire hearing to be held without an available accused person being personally present. The Supreme Court itself addressed these issues head-on in *Maryland v. Craig*, 497 U.S. 836 (1990). The court reiterated the strict general rule, asserting that the combined effect of the key elements of confrontation - physical presence, oath, cross-examination, and observation of demeanor by the trier of fact - serve the purposes of the Confrontation Clause by ensuring that evidence admitted against the accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings. The court noted that face-to-face confrontation enhances the accuracy of fact-finding by reducing the risk that a witness will wrongfully implicate an innocent person, and that there is a strong symbolic purpose served by requiring adverse witnesses at trial to testify in the accused's presence. 497 U.S. at 845-47.

The court then concluded in *Craig* that the Confrontation Clause does not categorically prohibit a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one-way closed circuit television. If the State makes an adequate showing of necessity, the State's interest in protecting child witnesses from the trauma of testifying in a child abuse case may be sufficiently important to justify the use of a special procedure that permits a child witness to testify in the absence of face-to-face confrontation with the defendant. 497 U.S. at 855.

The standard established by the court in *Craig* constructs a substantial roadblock that preserves the sanctity of the right to in-person, face-to-face confrontation. The requisite finding of necessity must be a case-specific one. The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. The trial court must find that such trauma would impair the child's ability to communicate. The

Supreme Court noted that all of the other elements of the confrontation right were preserved in *Craig*, 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. 497 U.S. at 855-57.

Prior to *Craig*, in *People v. Cintron*, 75 N.Y.2d 249 (1990), the New York Court of Appeals had upheld the facial constitutionality of Article 65 of the Criminal Procedure Law, which authorizes a trial court, under specified circumstances in certain sex crime cases, to permit a child witness to testify from a testimonial room over live two-way closed-circuit television. Citing *Coy*, and anticipating *Craig*, the Court of Appeals had cautioned that there must be an individualized showing of necessity, and that the infringement on the defendant's confrontation rights must be kept to a minimum. 75 N.Y.2d at 258. The Court of Appeals specifically relied on the protections contained within Article 65. To declare a child witness vulnerable, the trial court must find that the witness will likely suffer severe mental or emotional harm if required to testify without the use of live two-way closed-circuit television. The finding must be based on clear and convincing evidence, and the likelihood of severe mental or emotional harm must be as a result of extraordinary circumstances. The trial court must set forth the causal relationship between factors which constitute extraordinary circumstances and the finding that the child witness is vulnerable. The trial court must be satisfied that the defendant's constitutional rights to an impartial jury and to confrontation will not be impaired. 75 N.Y.2d at 262.

Subsequently, in *People v. Wrotten*, 14 N.Y.3d 33 (2009), the Court of Appeals held that the trial court did not err when it permitted an adult complainant living in another state to testify via real-time, two-way video after finding that because of age and poor health he was unable to travel to New York to attend court. The trial court's inherent powers, and Judiciary Law § 2-b, vested it with the authority to fashion this procedure. *Wrotten*, 14 N.Y.3d at 36. The court also held that such a procedure does not necessarily violate a defendant's confrontation rights, noting that the public policy of justly resolving criminal cases, while protecting the well-being of a witness, can justify the use of live two-way video testimony in the rare case where a key witness cannot physically travel to court in New York, and where the defendant's confrontation rights have been minimally impaired. If the trial court's findings were supported by clear and convincing evidence, *Craig's* public policy requirement was satisfied. However, "[t]elevised testimony requires a case-specific finding of necessity; it is an exceptional procedure to be used only in exceptional circumstances." 14 N.Y.3d at 39-40.

The continuing validity of *Craig* in cases in which two-way rather than one-way video has been used is made plain by the Supreme Court's refusal in 2002 to approve a proposed amendment to Federal Rules of Criminal Procedure, Rule 26, Taking Testimony, which stated then and states now: "In every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rules adopted under 28 U.S.C. §§ 2072-2077." The proposed amendment would have authorized contemporaneous, two-way video presentations 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). Justice Scalia filed a statement. He "share[d] the majority's view that the Judicial Conference's proposed Fed. Rule Crim. Proc. 26(b) is of dubious validity under the Confrontation Clause of the Sixth Amendment to the United States Constitution, and that serious constitutional doubt is an appropriate reason for this Court to exercise its statutory power and responsibility to decline to transmit a Conference recommendation." In response to the contention that "the use of a two-way transmission made it unnecessary to apply the Craig standard," Justice Scalia asserted: "I cannot comprehend how one-way transmission (which Craig says does not ordinarily satisfy confrontation requirements) becomes transformed into full-fledged confrontation when reciprocal transmission is added. As we made clear in Craig … a purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations in the defendant's presence—which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant's image. Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones." *Federal Rules Decisions*, 207 F.R.D. 89 (April 29, 2002).

Conducting a Virtual Hearing Would Violate the Federal and State Confrontation Clauses Because the Court Has the Option of Simply Waiting Until An In-Person Hearing Can Be Done, and Thus No State Interest is Served By Proceeding, Much Less an Important One

In each case in which a limitation of the right to in-person, face-to-face confrontation has been upheld on appeal because of the need to protect a particular witness, the trial court had no apparent option other than to proceed with a trial. There was no reason to think that the vulnerable children in *Craig* and *Cintron* were going to become less vulnerable, or that the witness in *Wrotten* was, despite his age and poor health, going to be able to travel to New York, in any foreseeable future.

In stark contrast, while the COVID-19 pandemic surely is an extraordinary circumstance that prevents this court from conducting an in-person hearing and providing full confrontation rights at this time, the court has the option to commence the hearing after in-person hearings become possible. In these circumstances, it makes no sense at all to conduct a hearing that will be difficult to navigate, is predestined to place respondent's confrontation rights at risk, and, if there is an appeal, may well be found unconstitutional. It makes far more sense to retain the status quo and wait. Waiting harms no one.

The court's desire to start clearing its case backlog falls woefully short of providing an important State interest generally, much less an individualized determination that this particular case needs to proceed despite the impairment of respondent's constitutional rights. No other reason to proceed has been posited, or is apparent. There is no legitimate, much less important, State interest at play. *See United States v. Pangelinan*, 2020 WL 5118550 (D. Kansas 2020) (government failed to show it was necessary to present testimony by two-way video to further important public policies where

prosecution of sex traffickers and those who abuse women, and limiting spread of virus, were important public policies, and video testimony might be reasonable resolution due to witnesses' health concerns, but there were reasonable alternatives, *including a continuance until transmission rate of the virus improves*).

Moreover, there is good reason for the court to eschew any reliance on *Craig* and its progeny, including *Wrotten*, and to look instead to *Crawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, the Court shifted from the Confrontation Clause balancing test for hearsay established in *Ohio v. Roberts*, 448 U.S. 56 (1980), to recognition of a confrontation right that is absolute as to all "testimonial" evidence unless a witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. 541 U.S. at 68.

In *People v. Jemison*, _N.W.2d_, 2020 WL 3421925 (Mich. 2020), the Michigan Supreme Court held that the admission of a forensic analyst's two-way, interactive video testimony violated the defendant's Confrontation Clause rights. The court noted that the holding in *Craig* was undercut by *Crawford*, where the Supreme Court emphasized the importance of face-to-face testimony to the confrontation right, and restored face-to-face testimony as a fundamental element of that right. The Michigan court decided to apply *Craig* only to the specific facts it decided, and apply *Crawford* in other cases, including the one before the court, in which the witness was neither the victim nor a child.

Even if this court determines that *Craig*, *Cintron* and *Wrotten* are still good law, the *Crawford* decision, at the very least, is another good reason for the court to eschew an extension of present case law beyond its very restrictive boundaries.

Finally, a virtual hearing undoubtedly will create a substantial risk that respondent's constitutional rights will be violated. It is not just the testimony of one witness that is involved. The entire trial - the testimony of all witnesses, the introduction of evidence, arguments by the prosecutor and defense counsel, and the court's rulings - will take place without respondent being personally present. *See S.C. v Y.L.*, 67 Misc.3d 1219(A) (Sup. Ct., N.Y. Co., 2020) (in matrimonial proceeding, court declines to conduct virtual contempt hearing, noting that it would be problematic and perhaps impermissible to conduct virtual hearing in proceeding that could result in defendant being sentenced to jail, that hearing was unlikely to be workable on Skype for Business platform; and that a contempt hearing "is far too serious a proceeding to operate under these less than optimum conditions").

Perhaps most importantly, respondent's counsel's ability to provide effective assistance will, at the very least, be impaired. Even if respondent and counsel are permitted to communicate privately, the contemporaneous and ongoing communication between respondent and counsel that is so essential to a fair trial, and, quite often, to counsel's ability to cross-examine a particular witness, will be absent if respondent and counsel are not in the same room. In Craig, the procedure required that the child witness, the prosecutor, and defense counsel withdraw to a separate room, while the judge, the jury, and the defendant remain in the courtroom. Thus, defense counsel is able to confront

the witness face-to-face during cross-examination. Under Criminal Procedure Law § 65.30(5), if the order of the court requires that the defendant remain in the courtroom, the attorney for the defendant and the district attorney shall also remain in the courtroom unless the court is satisfied that their presence in the testimonial room will not impede full and private communication between the defendant and his or her attorney and will not encourage the jury to draw an inference adverse to the interest of the defendant. Thus, neither the procedure upheld in *Craig*, nor the procedure upheld in *Cintron*, deprives a defendant of both the opportunity to consult with counsel during the child witness's testimony, and the opportunity to have counsel confront the witness face-to-face. And, of course, in *Wrotten* the defendant and his counsel were together during the televised testimony.