

People ex rel. Eraso v Warden
2021 NY Slip Op 33671(U)
May 3, 2021
Supreme Court, Bronx County
Docket Number: Index No. 802747/2021
Judge: Daniel L. Lewis
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SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY

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THE PEOPLE OF THE STATE OF NEW YORK
ex rel. Laura Eraso, Esq.
on behalf of MICHAEL GARCIA

Index No. 802747/2021
B & C 2412100208
NYSID 127999990467J
Warrant #833933

Petitioner,

-against-

DECISION & ORDER

WARDEN, CYNTHIA BRANN, Commissioner
NYC Dept. of Correction; ANTHONY ANNUCCI,
Acting Commissioner, NYS Dept. of
Corrections and Community Supervision,
Respondents.

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David L. Lewis, ASCJ

Petitioner sought the issuance of a writ of habeas corpus and now seeks conversion of the application under CPLR Article 70 to a proceeding under CPLR Article 78. The grounds asserted were that Petitioner was denied the right of confrontation by the use of a telephonic hearing, that the hearing officer abused his discretion in denying Petitioner an adjournment on the basis that videoconferencing was due to start in a month, and that the evidence was insufficient to sustain a finding of probable cause, in light of the identification issue, to establish that Petitioner committed the charged violation.

FACTS

Petitioner was released to parole supervision and agreed to follow certain conditions that DOCCS imposed upon him on being released. Petitioner was declared delinquent on December 21, 2020. He was charged with violations of the conditions of his release including possession of a firearm, pushing an individual, stealing money and, a driver's license from the complainant. On February 1, 2021, Petitioner was served with a copy of the violation of release report and notice of violation. Petitioner demanded a preliminary hearing. It was scheduled for February 9, 2021 and later rescheduled for February 11, 2021. DOCCS proceeded on one charge, the stealing of money from the complainant.

Petitioner pleaded not guilty. At the hearing, Petitioner was left alone in a telephone conferencing booth. He was unable to see anyone involved in the hearing, including the complainant. No one was able to see him, including the complainant.

At the beginning of the hearing, the hearing officer made the pro forma and standard announcement justifying why DOCCS was using telephonic hook ups for hearings. The hearing officer's statement was "It is the Board of Parole Adjudication Bureau's intention to provide a timely hearing consistent with the laws and regulations governing these proceedings. This hearing is being conducted via Webex audio only in response to the COVID-19 pandemic and the need to comply with appropriate guidance to ensure social distancing. This is the only means available to this court to ensure that Mr. Garcia is afforded a timely hearing". Petitioner refused to consent to a hearing over the telephone on the basis that it deprives Petitioner of his right to confrontation. Petitioner, in objecting to proceeding without video being available for the conducting of a hearing pointed out that the sole issue was identification. Further Petitioner objected to the dilatory practice of DOCCS and a series of broken promises as to video availability. Petitioner cited this court's decision in *People ex rel. Jordon v. Brann*, Index no. 800023-21 (Sup Ct Bronx Cty February 9, 2021 (Lewis, J.) The objection was overruled. The hearing officer stated that his instructions were to proceed, noting the objection.

Petitioner therefore moved for an adjournment until video components to the hearing became available. The motion was based on DOCCS representation on February 10, 2021 that a video component was expected in the first week in March according to Assistant Commissioner Joseph Franchini. The hearing officer, after consulting with unnamed and unidentified superiors, denied the request for the adjournment.

The prosecuting parole officer called the complainant as a witness. The complainant was the victim of a push in robbery in his home. When he answered a knock on his door, he was confronted by three men, two were masked, one was not. Cash was taken from him. The three fled. The complainant called the police. The police took him to view photographs, one of which he picked out saying that he recognized the face from the neighborhood. The identification itself was based upon a short viewing, while having a gun pointed at him. Complainant did not know the name of the person whose photograph he picked out. He recognized him from the neighborhood. The police officer told him it was "Michael Garcia" and complainant repeated that name at the hearing. At the

hearing, no picture was introduced into evidence and there was no explanation for its absence. No police officer was called regarding the identification. The failure to have a video component for conducting the hearing barred the complainant from seeing Petitioner and to determine whether Petitioner was the person who committed the robbery or even if he was the person in the photograph introduced into evidence.

The hearing officer found probable cause acknowledging that there was an identification issue.

DISCUSSION

Petitioner seeks the conversion of his habeas writ into a CPLR Article 78. Petitioner has unpaid bail that prohibits the granting of the writ. Success on the merits in this proceeding would not entitle him to immediate release from custody, thus the remedy of habeas corpus is unavailable. *People ex rel. Maiello v New York State Bd. of Parole*, 101 A.D.2d 569, 573 (1st Dept 1984), *affd* 65 N.Y.2d 145. (1985). Respondents urge the court not to covert the action offering up; "Talk is cheap, but petitioner's unpaid bail is not". The court observes that heckling from the cheap and comfortable seats is not legal argument. This court agrees that conversion under CPLR 103(c) is in the interest of justice and therefore appropriate.

SCOPE OF THE COURT'S REVIEW POWER

While parole preliminary and final hearings are administrative proceedings in most respects and are not criminal trials, the determinations of the hearing officers are judicial functions and are reviewable to determine whether they were performed in accordance with law. Exec Law 259-i (5). Upon an application following a preliminary hearing, the court's power of review is limited to determining whether the evidence was sufficient to support the hearing officer's determination and, having established that it was, deciding whether the required procedural rules were followed. *People ex rel. Watson v Commissioner of New York City Dept. of Corrections*, 149 AD2d 120, 125 (1st Dept. 1989), citing *People ex rel. Wallace v State of New York*, 67 AD2d 1093 (4th Dept. 1979). Within its limited power of review, this court finds that the evidence did not support the hearing officer's determination and that required procedural rules were not followed.

THE RIGHTS DUE A PAROLEE

The New York Constitution extends to civil litigants the right to personally appear and confront witnesses NY Const, art I, § 6. See e.g., *Circle Int'l Group Inc v. Anikayova*, 2005 NY Slip Op 50979 (U) (Sup Ct Kings Cty 2005). New York Executive Law § 259-i (3) and 9 N.Y.C.R.R. §§ 8004 and 8005 set out the specific procedures required to be followed in the conduct of a parole revocation hearings. Within three days of being arrested on a parole warrant, the parolee must be given notice of the charges and of his rights including "that he has the right to confront the witnesses against him". N.Y. Exec. Law § 259-i(3)(c)(iii); 9 N.Y.C.R.R. § 8005.7. The parolee has the right to appear and to present witnesses and evidence on his own behalf, as well as the right to confront and cross-examine adverse witnesses. N.Y. Exec. Law §§ 259-i(3)(c)(iii) & (iv); 9 N.Y.C.R.R. § 8005.3(c). The constitution, statute and the rules use the terms "confront and cross examine" embodying the Sixth Amendment values. The right to physically confront accusers and witnesses has its strongest justification at the trial level, but the Sixth Amendment provision also applies to matters such as probation and parole revocations. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

The lodestar for parole procedure, *Morrissey v Brewer*, 408 U.S. 471 (1972) found that a parolee must be provided with: (1) written notice of the claimed parole violations; (2) disclosure of the evidence against the parolee; (3) an opportunity to be heard and present witnesses and documentary evidence; (4) an opportunity to confront and cross-examine adverse witnesses; (5) review of the evidence by a "neutral and detached hearing body"; and (6) a written statement of reasons for revocation and the evidence relied upon. *Morrissey*, 408 US at 489 (internal quotation marks omitted). *Morrissey* sets the constitutional floor below which violates parolee's due process rights. DOCCS again asserts its concept of what constitutes due process rights, acknowledging the words of the statute but citing case law from ordinary civil proceedings, clearly inapplicable even to parole preliminary hearings. *Gagnon*, *supra*. The liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty. Its termination inflicts a 'grievous loss' on the parolee and often on others. Its termination calls for some orderly process, however informal. *Morrissey*, 408 U.S. at 482. Procedural due process rights are warranted if an individual otherwise would be condemned to suffer grievous loss such a return to prison. Despite the insistence on the lesser rights of a parolee it is a basic tenant of society that the

deprivation of liberty carries with it enhanced due process. *Fortunato v Warden*, 48 Misc3d 649 (Sup Ct, Bronx Cty (2015)).

By the restriction of parolee's liberty interest, the quasi-criminal, quasi-judicial parole hearing procedure is different from every other area of administrative law. "(W)hen all the legal niceties are laid aside a proceeding to revoke parole involves the right of an individual to continue at liberty or to be imprisoned. It involves a deprivation of liberty just as much as did the original criminal action and * * * falls within the due process provision of section 6 of article I of our State Constitution." *People ex rel. Combs v. LaVallee*, 29 A.D.2d 128, 131 (4th Dept 1968), *aff'd* 22 N.Y.2d 857 (1968). Parole revocation proceedings, both the preliminary and the final revocation hearings place the liberty interests of the parolee at stake. When a minimal amount of due process is owed, courts must ensure that such rights are not discarded. *Joint Anti-Fascist Refugee Comm v. McGrath*, 341 123,200-201 (1951).

THE RIGHT TO CONFRONTATION

When the English Crown sentenced Sir Walter Raleigh to death for treason without allowing him to cross-examine the key witness against him, Lord Cobham, it sparked a public outcry. See *Crawford v. Washington*, 541 U.S. 36, 44, 50 (2004). The controversy culminated in English law developing a right to confront witnesses. *Id.* at 44. Almost two centuries later, the American Founders enshrined that right in the Confrontation Clause of the Sixth Amendment. Drafters of the New York Constitution applied the right of confrontation to both civil and criminal cases. NY 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 as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her" The language "confront and cross examine" is the right drawn from the Sixth Amendment. The Confrontation Clause of the Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The main goals of the right to confrontation were (1) to afford the defendant the opportunity to receive accusations directly from the mouth of his accuser, (2) to prevent false accusations against the defendant by those unwilling to state such allegations to the defendant's face, and (3) to allow the judge and jury to view the demeanor of the witnesses testifying.

The question in this application arises out of what rights Petitioner possesses and to what extent he has the right to confront, and cross examine witnesses against him lies within that panoply. The basic elements of confrontation are physical presence, oath, cross-examination, and observation of demeanor by the trier of fact. *Maryland v. Craig*, 497 U.S. 836 (1990). The Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988). The law allows for a non-complete panoply of rights in a parole hearing. Within that lesser panoply of due process rights, the rights of cross examination and confrontation are specifically enumerated in the constitution, statute, and the rule.

Questioning in one's presence is the heart of confrontation. Respondents, ignoring the State Constitutional provision, New York State Const. Article I § 6, press their point that the preliminary hearing need not have confrontation face to face. A parolee's rights to confront adverse witnesses applies to preliminary parole revocation hearings, which the witnesses may be compelled to attend (see Executive Law § 259-i (3) (c) (iii) (providing that, at a preliminary hearing, a parolee "has the right to confront the witnesses against him or her"); *People ex rel. Rosenfeld v Sposato*, 87 AD3d 665, 665-666 (2d Dept 2011) (confrontation)

Respondents also suggest that there is no confrontation right because they impose a great burden on State's parole system, taking the language in *Morrissey* wholly out of context. *Morrissey* is to the contrary, identifying confrontation as an enumerated right, whose absence is a deprivation of due process. The sentence in the case reads: The few basic requirements set out above, which are applicable to future revocations of parole, should not impose a great burden on any State's parole system". Among those requirements includes "questioning in his presence". *Morrissey* 408 US at 487,490.

In setting out the limits of due process at parole hearings, includes "On request of the parolee, a person who has given adverse information on which parole revocation is to be based is to be made available for questioning in his presence." 408 US at 387. *Morrissey* saw questioning in the presence of the parolee of the accuser as a threshold right and not a great burden on the state's parole system." Given the due process threshold, Respondents' case law must be read in light of the *Morrissey* language. *Morrissey* does not accept Respondents sliding scale of due process. While a preliminary hearing has less due process than a full criminal trial, Respondent's suggestion that confrontation does not mean what the statute says, is a right not afforded parolee in preliminary hearings in

parole revocation matters ignores Morrissey's constitutional requirement of "questioning in his presence". The alternative is that the parolee has been denied due process.

Despite the relaxed evidentiary standards at hearings, "a parolee has due process and statutory rights to confront adverse witnesses whose statements are offered". *People ex rel. McGee v Walters*, 62 NY2d 317, 319 (1984). McGee simply holds that, while a "strong preference" for confrontation and cross-examination exists in parole revocation proceedings, the victim's absence nevertheless may be excused "upon a specific finding of good cause" McGee 62 NY2d at 319. The use of the term "preference" merely acknowledges that an absolute confrontation bar to evidence would exclude hearsay excepted evidence. On one hand confrontation implicates evidentiary rules as in the context of hearsay but embodies procedural due process in the conduct of the fact-finding hearing or trial. The Supreme Court also held that there was a preference for face-to-face confrontation *Craig v Maryland*, 497 U.S. 836, 857 (1990).

Petitioner does not claim that the right to face to face confrontation is absolute. In the absence of an absolute right, courts express a preference for the fulfillment of that right, with a particular type of limit on a particular type of case. An examination of the pertinent cases, where liberty is at stake, demonstrates that a preference is a step down from an absolute right.

"Although these rights embrace a strong preference for face-to-face confrontation and cross-examination, a hearing examiner may, nevertheless, upon a specific finding of good cause, permit the introduction of adverse hearsay statements without affording the parolee an opportunity to confront their declarant" McGee, 62 NY2d at 319 (emphasis added). Further, "(a)ny determination that dispenses with the need for confrontation requires consideration of the rights' favored status, the nature of the evidence at issue, the potential utility of cross-examination in the fact-finding process, and the State's burden in being required to produce the declarant" (*id.* at 319-320).

DOCCS claimed that telephone conferencing during the pandemic was supported by good cause. The same reasoning that DOCCS uses to justify telephonic hearings would also justify a video link, as opposed to in person hearings, without anyone running the slightest risk of infection from the screen and with the ability to maintain social distancing as well. No good cause was shown. Good cause based on the conditions due to COVID-19 may not be available

indefinitely. Petitioner was subjected to a preliminary and likely a final hearing conducted on the telephone, with no video component, where the sole issue is identification. Video testimony is the only way that the hearing officer could judge credibility despite his finding. Video is the preferred system to telephone. DOCCS is aware of this but has failed to successfully implement it. Respondent seeks to explain away the failure but even assuming good faith, it is simply inconceivable that the failure to effectuate a system for almost a year, when the courts implemented one within days, can be excusable and can justify forcing petitioner to proceed in this totally inadequate way at his preliminary hearing and likely his final hearing. The evidence submitted by DOCCS does not alter this court's conclusion in Jordon.

Respondents properly point out that this is not a criminal case. The key due process right is "confrontation". N Y State Const. Article I § 6. It is this right that DOCCS fails to meaningfully provide and thus violates the due process rights of the parolee as minimal as they may be. New York, unlike the federal constitution has provided for the right of confrontation in every civil and criminal case without differentiation. New York State Const. Article I § Sec.6. Respondents seem unaware of the state constitutional provision. They instead cite civil cases where courts have permitted telephone testimony in matters where no one's liberty was at stake. See e.g. Claim of Hoffman, 138 AD2d 785 (3d Dept. 1988) (unemployment benefit hearing). Cases cited by Respondents have no application. Further the standard they pick, requires only a review of whether the decision is arbitrary and capricious. The evidentiary standard is not an Article 78 administrative rule or non-liberty interest proceedings such as licensure, standard, but a due process requirement.

In the context of a quasi-criminal quasi-judicial hearing, the court is informed by the Supreme Court Sixth Amendment jurisprudence. The Supreme Court in *Coy v Iowa*, 487 US 1012 (1988) and later in *Maryland v. Craig*, 497 U.S. 836 (1990) permitted video conferencing as the outer limit of the due process guarantee. Notwithstanding the constitutional guarantee of the right of confrontation, which literally commands that adverse witnesses testify in the presence of the accused i.e. *California v Green*, 399 US 149, 157-158 (1970); *Pennsylvania v Ritchie* at 51; *Coy v Iowa*, 487 US 1012, 1016 (1988); *People v Arroyo*, 54 NY2d 567, 570 (1982), cert denied 456 US 979 (1982)), most of the states, including New York, have enacted statutes which allow a child to testify outside of the presence of the accused under certain circumstances. See *Craig*, 497 US at 853-854 (setting forth state statutes). These statutes were enacted for two

reasons. First, it was recognized that “(c)hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim”. *Pennsylvania v Ritchie* at 60; see *Matter of Nicole V.*, 71 NY2d 112, 117 (1987); *Matter of Philip M.*, 82 NY2d 238, 243 (1993), and because even where evidence of child abuse is discovered by law enforcement and judicial proceedings are commenced, “the child may be reluctant or unable to testify.” *Matter of Christina F.*, 74 NY2d 532, 535 (1989). Secondly, these statutes effectuate the states' legitimate interest in protecting young victims of sexual abuse (See *Coy v Iowa* at 1020; *Craig* at 852-853; *People v Cintron*, 75 NY2d 249, 259 (1990)). The right to a face-to-face viewing does not require child witnesses in sexual abuse cases to view the defendant, but the right to confrontation is preserved by the closed-circuit television. In every case, it passes constitutional muster because it has a video component.

Coy v Iowa addressed the requirement that confrontation requires presence by finding that two-way video conferencing or videoconferencing so that the accuser does not see the defendant, but the defendant can see his/her accuser is not sufficient for the requirement of face-to-face confrontation. For the majority, Justice Scalia focused on the importance of requiring face-to-face confrontation noting that physical confrontation makes it less likely that a witness will lie on the stand because “(i)t is always more difficult to tell a lie about a person to his face than behind his back,” and even if the witness does lie, it will likely be less convincing when recited before the defendant. Furthermore, the trier of fact will have a better opportunity to draw its own conclusions on the veracity of the testimony based on the witness's demeanor. Therefore, because the children could not see *Coy* through the screen as they testified, the procedure violated *Cody's* right to confrontation. That ruling that the victim must see the defendant was re examined and rejected in *Craig*.

In *Craig*, the Supreme Court held that the Confrontation Clause does not categorically prohibit child abuse victims from testifying against criminal defendants via one-way closed-circuit television. *Id.* The court in *Craig* emphasized three important prerequisites before allowing any substitute for face-to-face confrontation. First, the trial court must make “case-specific,” individualized findings before any witness can testify by remote means. DOCCS has applied this method to every case. The state interest in the health of the parties and witnesses during a time of raging pandemic is not frustrated using a video component. The rights of the parolee in contrast are completely thwarted in

establishing that he did not commit the act that is the basis for issuance of the warrant. Second, a finding of “necessity” requires a direct relationship between an important state interest and the use of witness testimony outside the defendant’s presence. In *Craig*, the court determined that the state had an important interest in “the protection of minor victims of sex crimes from further trauma and embarrassment,” but the court explained that this interest alone does not justify remote testimony.

The *Craig* Court said that the “presence” requirement can be satisfied by videoconferencing if the testimony is (1) reliable and (2) if a specific necessity has been shown for videoconferencing. *Craig* at 855. Rather, remote testimony is “necessary” only if the trial court finds that it was the defendant’s presence that causes the trauma. No such allegations were made by DOCCS as to this Petitioner. In this matter, there was no such necessity. The inability to view either the complainant or the parolee undercuts the reliability of the proceeding as demonstrated by the identification issue being acknowledged by the hearing officer. The reliability of the testimony is otherwise assured only when the three other elements of confrontation— “oath, cross-examination, an observation of the witness’ demeanor”—are present. See *Ettinger, Gerger and Pollack, Ain’t Nothing Like the Real Thing: Will Coronavirus Infect the Confrontation Clause? The Champion*, May 2020 at 56-60. “(A) State’s interests ((here, the physical and psychological well-being of child abuse victims) may be sufficiently important to outweigh, at least in some cases, a defendant’s right to face his or her accusers in court.” *Craig* at 853. Though a criminal case, *Craig* suggests that traditional constitutional rights (such as a defendant’s presence) can be satisfied or modified if videoconferencing satisfies other sufficiently important interests. With the restriction and exception on face-to-face confrontation, necessity regarding the right to confrontation requires a visual component.

Respondents also misquote *People ex rel. McGee* to establish that the right to face to face confrontation is only a preference. *McGee* refers to it as a “strong preference”. *McGee* states that there is a strong preference for confrontation. Respondents see the word preference as limned by whether it is convenient. But *McGee* uses the word “strong” intensifying the weight of preference. Preference means preference as it is used in the strong preference for resolving cases on their merits, *Youwanes v Steinbrech*, 2021 NY Slip Op 02232(1st Dept April 08, 2021 See *Pricher v City of New York* (251 AD2d 242, 674 NYS2d 674 (1st Dep’t 1998)), or to certain motions to dismiss CPLR 3012(d)

or freedom of contract; *Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413(2013) or merit selection *Matter of City of Long Beach v Civil Serv. Empls. Assn., Inc.—Long Beach Unit*, 8 NY3d 465(2007) or particular court's jurisdiction ("strong preference" for resolving summary landlord-tenant proceedings in Civil Court) (*44-46 W. 65th Apt. Corp. v Stvan*, 3 AD3d 440, 441 (1st Dept 2004).

Given the McGee Court's use of the words "strong preference", face to face confrontation when strongly preferred requires more than brush off. Respondents do not address the issue of the preference being strong, instead it sounds like a whim. According to Craig, the Confrontation Clause merely embodies a "preference" (rather than a requirement) for face-to-face, in-person confrontation, which can accordingly be limited to satisfy sufficiently important interests. In both Coy and Craig, the preference is particularly satisfied by a video component. It is the video component that allows the accused to see his accuser face to face. Craig sets the test as whether a testifying witness can be observed is the crucial determinant if the confrontation requirement has been fulfilled so as to meet constitutional requirements. If any platform that does not allow for observation would be impermissible, then a telephonic platform cannot meet constitutional muster as to the right of confrontation.

In an attempt to cancel the Jordon, supra, decision, Respondents recast the decision as if it were purely a Sixth Amendment issue and drive home the non-challenged point that the Sixth Amendment applies only to criminal cases. Confrontation is not confined to criminal cases. New York State Const. Article I § 6 provides for confrontation in both civil and criminal cases. The Executive Law provides for confrontation in parole hearing. The Rules of DOCCS provide for confrontation. Other non-criminal cases in which a liberty interest is at stake require confrontation in the context of quasi-judicial quasi criminal nature. *Matter of Doe*, 13 Misc. 3d 497. (Sup Ct, Oneida County 2006),

Respondents also claim that there is no "blanket right" to face to face confrontation. The Morrissey holding specifically includes the language includes "occurring in parolee's presence" which contradicts Respondent's position that there is no right to face to face confrontation. This court in Jordon limited the right of face-to-face confrontation to cases that depended on identification. Respondents again quote Justice Fabrizio, citing two cases involving parole interviews, for the proposition that teleconferences are approved in those cases. See *Matter of Webb*

v. Travis, 26 AD3d 614 (3rd Dept. 2006) and Mack v. Travis, 283 AD2d 700 (3rd Dept 2001). Respondents claim that DOCCS did not have to provide visual capabilities. As indicated in Jordon, this court disagrees with the interpretation.

Parole interviews, as opposed to parole hearings, do not require confrontation. Because no evidence is heard. Respondents seek to stretch these cases beyond its ability to sustain their argument. The cases do not involve witnesses. They permit the use of teleconferencing for parole interviews which are non-adversarial proceedings.

Respondents also cite several cases to support their decision where judges have found cases that dismissed the contention that video conferencing is no violation of due process. Not one of these cases addressed the constitutional provision or the limited nature of the Jordon decision. For example, in People ex rel. Crawley v Warden, Index # 400233-2020 (Sup Ct Bronx Cty) (Greenberg, J.) citing People ex rel. Williams on behalf of Forrest v Annucci, Index no. 400219-2020 (Sup Ct Bronx Cty 2020 (Fabrizio, J. In Crawley, it is significant because the facts of the case make face to face confrontation unnecessary as to identification, because the crime that led to the parole warrant occurred in the parolee's home. He in fact called the police.

Significantly none of the cases cited by Respondents reference the State Constitution provision in New York State Const. Article I § 6. To the extent that decisions consider telephonic contact enough to constitute confrontation and causes DOCCS to call the Jordon decision an "outlier", this court disagrees.

As may be inferred this court declines the invitation of overrule its own decision in People ex rel. Jordon v Warden, supra. If anything, it has gained greater strength with the passage of time and DOCCS continued failure to protect the rights of parolees by failing to provide face to face confrontation considering the specific words of the constitution, the relevant statute, and rules. Jordon stands for the proposition that due process requires face to face confrontation as the statute and the rule use the word "confrontation". This court held in People ex rel. Jordon, supra, there are unique circumstances where the denial of face-to-face confrontation rises to the level of violation of due process. Where there is an identification of the parolee by a civilian witness and where that confrontation is the heart of the case, the absence of face-to-face concentration is a due process violation.

Respondents assert that to follow the Jordon decision would void every objected to parole hearing that lacked a visual component. Jordon made it clear that those cases with technical violations would not rise to the level of a due process violation. See also *People ex rel. Robinson on behalf of Mobley v. Brann*, Index No. 802379/2021 Sup Ct Bronx Cty (April 16, 2021) (Lewis, J.). In *Mobley*, this court held that in matters where there is not an identification of the parolee by a civilian witness, determines whether due process is violated by as telephonic hearing. It is the avoidance of misidentification that lies in the heart of all the due process values, no matter how minimum one's due process rights are alleged to be. The bare minimum of due process requires a visual observation by the complainant and a determination as to whether the parolee in the hearing was the person identified by complainant. DOCCS never did anything to prove identification.

Respondents also argue that the pandemic prevented the providing of video components to hearings. CO VID 19 struck the City and State of New York with viciousness. The organs of government all but shut down. On March 7, 2020, Governor Andrew M. Cuomo issued the first Executive Order No. 202 declaring a state of emergency because affected local governments (would be) unable to respond adequately" and therefore the declaration of "a State disaster emergency for the entire State of New York" was necessary (Executive Order (A. Cuomo) No. 202). In a month, the number of cases went from less than 100 to exceed 138,000 (NY Virus Deaths Hit New High, but Hospitalizations Slow, NY Times, Apr. 7, 2020, <https://nyti.ms/3aOzvXz>).

In the days and weeks that followed, the Governor, in a series of executive orders, continued to suspend other laws and regulations that were viewed as potential impediments to effectively addressing the COVID-19 emergency. Executive Order 202.8, which ordered all nonessential businesses and nonprofit organizations to "reduce (their) in-person workforce at any work locations by 100% no later than March 22, 2020) at 8 p.m." (Executive Order 202.8). The Office of Court Administration followed suit. Starting on Friday, March 13, 2020, the court system began drastically scaling back its operations to "reduce courthouse traffic). In a memorandum issued two days later, Judge Marks ordered the postponement, "until further notice," of "all nonessential functions of the courts" (March 15, 2020 memorandum from CAJ Marks to all judicial and non-judicial UCS personnel). Court personnel not involved in essential court operations were directed to remain home indefinitely (March 17, 2020 memorandum from CAJ Marks to all judicial and non-judicial UCS personnel). Soon after the March 2020

order suspending matters, the court system having continued arraignments established a system of audio-visual appearances by parties, attorneys, and the court. The courts implemented a video system almost immediately when in person appearances became dangerous and impractical.

DOCCS claims that necessity justified the lack of video for this Petitioner's hearings. Teleconferences were permissible as a matter of necessity. Clearly these were a matter of necessity for the beginning months of the pandemic. Teleconferencing was meant to serve as a temporary stop gap in the middle of a global health crisis. It was never meant to be a permanent alternative to in-person hearings. Now, more than a year later, DOCCS has failed to implement a meaningful video platform for most accused parole violators on Rikers Island. DOCCS began video conferencing on a limited basis in mid-March with limited number of video booths. Since its implementation on March 1, 2021, DOCCS has held only 2-5% of parole violation hearings on video; an average of 2 video hearings a day in a schedule of 30-40 cases. The few hearings that are calendared to take place by video, appear to be scheduled arbitrarily without any consideration of the nature of the hearing, such as whether it requires identification of the parolee as the criminal actor., thereby depriving all accused persons of the reasonable expectation that their hearings will be conducted in a manner that comports with their constitutional and statutory rights.

Petitioner's telephonic hearing began months after the court system's audio and visual system was up and running. The issue is when does necessity begin and when does it end. By the time of this Petitioner's preliminary hearing, DOCCS inability to set up visual components to the hearings were no longer a matter of necessity. "Necessity" justified teleconference proceedings due to the inability to conduct in person or video conferencing hearings for a brief period at the outset of the pandemic. That justification became inapplicable over time as DOCCS failed to install video for such hearings. COVID was the reason to conduct hearings remotely but not the reason for a lack of video. Social distancing and observing COV 19 protocols had nothing to do with the length of the absence of video components to hearings. The only reason there was no audio component was that DOCCS could not get it together. See Jordon, supra. The hooking up of the entire statewide court system from Skype to Teams is a far greater Herculean task.

DOCCS' offers an elaborate series of excuses for the failure to have a visual component, claiming that they have been trying to set up video conferencing as sought by Legal Aid and Petitioner. It is DOCCS that issued the warrant in this case and is charged with holding the hearing and denied an adjournment to wait for a proper hearing. DOCCS exonerates itself using the term, "expeditiously as possible within the constraints of intergovernmental bureaucratic requirements". When Respondents assert that it was only in mid-January of 2021 that DOCCS made an accommodation to its own security practices regarding individual devices to the agency network, there is no explanation why that internal activities that DOCCS could undertake at any time took that long. There have been numerous inexcusable delays and broken promises as to when Legal Aid clients would finally have access to video technology. Seven months into the pandemic -from October 13, 2020 to November 4, 2020 -DOCCS finally conducted a select number of parole revocation hearings by Skype, but those hearings ended abruptly once DOC and the Office of Court Administration ("OCA") switched their video platform from Skype to Microsoft Teams on November 9, 2020. Now that Teams has finally been implemented as a temporary measure until in-person hearings can safely resume, the roll out has been entirely inadequate. It took until mis January when DOCCS made an accommodation to its security practices regarding connecting individual devices for Teams to the agency network by DOCCS delaying until January to reconfigure its mainframe components to allow Microsoft Teams' platform access to it, is inexplicable.

DOCCS complains of the complexity of scheduling hearings but Criminal Court hearings require the scheduling of the matter like every case, DOCCS is not immune from those necessities. But once it was clear that the entire court system could hold teleconferences with both audio and video, DOCCS had to follow suit. and should have responded quicker.

Respondents also argue that the COVID V19 pandemic "provide ample reason to overcome any such right" Constitutional rights are most needed in times of peril. The pandemic provides an excuse for DOCCS but not a reason to "overcome a right." Under our governmental structure rights are not "overcome". Especially when the cause is identified as "within the constraints of intergovernmental bureaucratic requirements." In effect DOCCS imposed a per se rule eliminating the visual component of the hearing it conducted. Per se rules advancing the important considerations of judicial efficiency and cost savings fail to outweigh the parolee's right to confrontation.

The only issue is a video hookup, not a return to in person parole hearings. The video hook up puts no one at a risk of infection through the computer screen. Thus, the pandemic as horrific as it is and has been, the virtual world of the screen and the speaker have replaced all forms of hearings except DOCCS. Respondents overstate their case. Americans voted through the pandemic. A video component to the hearing would be no more dangerous to the need for social distancing than the telephone hearing. The challenges posed by COVID-19—i.e., the continued operation of parole hearings seemingly did not arise to a sufficiently important level to allow parole to conduct hearings by videoconference but did rise to permit telephonic hearings. Respondents assert that the necessity of the pandemic justifies the absence of a video component in the conduct of the hearings. This court acknowledges the unprecedented alteration of life caused by the COVID 19 pandemic. It also acknowledges that in person hearings had to end to preserve the health of all the participants. At the same time, hearings, a right of the arrested parolee, had to also go on. There was a necessity for a process to allow for safety, social distancing, and the continuation of hearings. That necessity should have been met by videoconferencing.

Affidavits in this matter demonstrate that the speed and efficacy in obtaining a video platform and facilities was in the control of DOCCS albeit in tandem with other agencies. Instead of the deprivation of face-to-face confrontation being limited to a particular class of cases and specifically to vulnerable witnesses, DOCCS yearlong wholesale inability to provide petitioners' right to confrontation remains an outlier. DOCCS was under an obligation to meet the need as set out by the constitution, the statute and DOCCS own rules.

The court having reviewed the affidavits of the Assistant Commissioner adheres to its opinion in Jordon. DOCCS asserts that it has made "consistent efforts" to establish appropriate visual proceedings. This court sees little consistency in the efforts alleged. It seems more episodic attention to the issue, proving lack of urgency. Gaps in the activity demonstrate a lack of urgency. if DOCCS understood and acted as swiftly as it claims. Microsoft itself was aiding in the conversion from Skype to Teams with a variety pf websites and likely consultants for purchasers. Respondents also stress the difficulties of converting from Skype to Microsoft Teams. It is evident that that information to has long been available from Microsoft. See e.g., <https://docs.microsoft.com/en-us/MicrosoftTeams/upgrade-workshops-landing-page>.

DOCCS also claims that it was taken by surprise by the shift from Skype to Teams. But in fact, DOCCS was informed “ages ago” in the words of one participant in a hearing. Respondents cite to a single hearing officer who said she did not know about the change. She seemed to be the only one who did not get the memo. It is inconceivable that the two governmental entities housing prisons DOCCS and NYC Department of Corrections are not in constant contact as regards to managing their respective interests.

To the extent that People ex rel. Linebacker 2020 Slip op 20171 (Kings Cty.) sees the delay in the installation of video components to teleconferencing by DOCCS occurring as only for a “brief period of time”, this Court respectfully disagrees. Not to deny the effects of COVID 19, this Court sees DOCCS response time as opposed to the Court system’s response time as dispositive regarding the right attached to the liberty interest of the individual being judged. Given that the law and regulations provide the right of confrontation as well as cross examination, DOCCS failed to move expeditiously and scrupulously regarding Petitioner’s explicitly enumerated right. Expeditiousness is not a standard. DOCCS creates a new standard to measure whether parolees have got their allotted due process. a standard justifying constitutional, statute, and rule noncompliance as convenience: “expeditiously as possible within the constraints of intergovernmental bureaucratic requirements.”

Respondents also again assert the canard that Legal Aid waived for all time all the rights to teleconferencing and sanctioned the absence of a video component. It claims newly discovered e mails in their files. Yet, once again it is backed by a questionable narrative. As reported elsewhere, see <https://www.thecity.nyc/justice/2020/3/17/21210427/defenders-plead-for-intimate-rikers-parole-hearings-to-go-to-video>: Lorraine McEvelley, who DOCCS claims consented to every telephonic hearing for all time tried to put the hearings on hold which DOCCS refused to do. Legal Aid wanted to ensure that social distancing was observed. The Legal Aid Society has from March of 2020 has unsuccessfully demanded visual components to parole hearings. DOCCS is well aware of that, and throughout this time has said it is attempting to implement such a system. Petitioner’s hearing was held in February 2021, four months after this court’s decision in Jordon.

Legal Aid responded to the forced selection of the lesser of two evils, no hearings and parolees just sit or going forward with telephonic hearings with

objections based upon a promise of DOCCS that they will only be conducted for a short time that proved not to be the case, is not a waiver. It is the same as arguing that the Attorney General having agreed to the issuance of a writ agrees to the issuance of all writs. The position that Legal Aid waived Petitioner's rights to a visual component of the hearing prior to events that got him violated is nonsense on stilts. No court has accepted the version, or the law asserted by Respondents. Significantly it is the parolee's preference that is controlling because it is his/he strong preference for or liberty at stake and it is evidence adverse to them.

The argument has not been sustained in any court and reeks of sophistry. In this matter newly discovered e mails allegedly support Respondents' position. The simplest answer is that Respondents view of the history of the issue and actions of its adversary are unreasonable. Respondents again claim that Legal Aid's consent is an admission that closes the door to the rights of their clients. First this is disingenuous, it is not that non-Legal Aid clients are getting video hearings. Instead, it is an attempt to punish Legal Aid for defending their clients as best they can, given the circumstances imposed by DOCS because of COVID 19.

Respondent's claim that Legal Aid in seeking to ensure that its clients not be held indefinitely until DOCCS implemented the appropriate system agreed to proceed with non- visual hearings. Respondent seeks to assert that this temporary measure applies to this Petitioner. This right is not for the lawyer to waive and certainly not for all future clients known and unknown. The essence of the waiver is that it be made by a petitioner and is voluntary, intelligent, and knowing. Respondents must see that such an argument cannot be sustained under the law. See Forrest, supra.

Respondents argue that its adversary's actions establish the constitutionality of what this court perceives as unconstitutional action. They make this assertion even though Legal Aid objected in this case to failure to provide video capabilities to meet the obligation of confrontation guaranteed by the statute and the rules. Respondents also takes the position that the "waiver" is forever, it also appears to take the position that the emergency is forever. DOCCS is the outlier in the criminal justice system in failing to provide a video component. The video component is not a preference but is guaranteed even in the limited due process context.

DOCCS in the initial notification to every parolee at their hearing says that only the telephonic hearing can ensure social distancing overlooking the

fact that a video component also ensures social distancing. The popularity of apps such as Facetime and others make it clear that the representation is not actually true. It is DOCCS failure to properly devise a video component that would also ensure social distancing. Further this was supposed to be a temporary stop gap measure not the default choice. The hearing officer under instructions to hold the hearing telephonically or not hold a hearing. Each hearing officer was instructed to overrule the objection.

To ascribe a blanket waiver of the right for its clients is an improper argument on the actual facts. A waiver cannot pre-exist the right. Thus, Petitioner's entrance in the system was after Legal Aid sought any sort of hearing for its clients instead of letting their clients languish until DOCCS gets its act together. Petitioner was forced by DOCCS' failure to provide any such system, to participate in the telephone hearings, lest there be no hearing at all, and the accused simply remain in custody indefinitely awaiting a hearing that would comport with due process. To accept Respondent's view is to allow a waiver of a right by general attempt to get at least some form of a hearing to aid in the release of prisoners illegally detained.

Respondents it should be noted also both absolve themselves of negligence and concede negligence in their response to the emergency Its citation to cases wholly inapplicable to the issues. It relies on sex offender litigation i.e., Mark G and conflates a right to be released, which is discretionary. Williams v Dep't of Corr & Cmty Supervision, 136 AD3d 147,169 fn. 10 (1st Dept 2016) It cites a case on the issuance of the order of protection in Molloy v Molloy 137 AD3d 47,52-53 (2d Dept 2016) from the rational basis test being applied to excuse negligent conduct by a governmental agency. None of the cases cited by Respondents address the fact that the loss of liberty includes certain rights.

Respondents also appear to concede "negligence" to avoid the constitutional responsibility, but the prison slip and fall is of a lesser magnitude that the loss of liberty attached to a parole hearing. Daniels v Williams 474 US 327 (1986) about an inmate suing because he was hurt stepping on a pillow left negligently on the floor of the prison. Similarly irrelevant is Mark G. v Sabol 247 AD2d 15 (1 Dept 1998) which involved negligence in the special relationship of protective services and a claim of due process violation due to injury. No case supported the proposition that the failure to provide confrontation is negligent alone. The Due Process Clause was intended to secure an individual from an abuse of power by government officials, not from acts of general negligence. Far from an

abuse of power, lack of due care, such as respondent's alleged negligence here, suggests no more than a failure to measure up to the conduct of a reasonable person. It is the court's opinion that DOCCS failed to do what a reasonable state actor would do in the circumstances. In fact, every other reasonable actor would have and does a video component to a hearing involving a liberty interest. DOCCS definition of negligence is inapplicable. This is not in the nature of a constitutional tort.

Additionally, DOCCS new explanation and excuses, presented in affidavit format by DOCCS officers reveal obfuscatory bureaucratise to avoid admitting that they have actually done little to cure the problem. The affidavits demonstrate a gesture but no more. DOCCS delaying until January to reconfigure its mainframe components to allow Microsoft Teams' platform access to it, is inexplicable This is especially true as DOCCS has been representing that the video element will go online "in a month", "shortly" and the like. In this record. Petitioner's counsel represented, without contradiction, what DOCCS said to Legal Aid on February 11, 2021. Assistant Commissioner Franchini announced that he was close to implementing video technology stating that at the very least there was a deadline of the first week in March. DOCCS did not meet that calendared target date/

DOCCS asserts that it is not acting in bad faith. The court agrees. DOCCS asserts that it is not attempting to deliberately sabotage the development of video hearings This court believes that as well. All is true. But DOCCS explanations in the affidavits submitted reinforce this courts view that COVID had nothing to do with DOCCS failures, only in their early motivation to protect all parties from being in the same room. But at some point, it had to be realized that the availability of a screen, the video component, had nothing to do with the pandemic.

ABUSE OF DISCRETION IN DENYING ADJOURNMENT

Petitioner in objecting to proceeding without video in a hearing that had as its sole issue identification, asked for an adjournment on the basis that a video component was expected in the first week in March according to the Assistant Commissioner Joseph Franchini on February 10, 2021. Petitioner sought the adjournment that would move the matter from the 10th of February to the beginning of March, when video components were said to be up and running. The Division's own procedures contributed to the need for an adjournment. Petitioner requested it in good faith, and without any claimed prejudice or other reason

militating against a postponement, the hearing officer abused her discretion in denying the adjournment. *Santora & McKay v Mazzella*, 211 AD2d at 462-463 (1st Dept. 1995); *People v Rodriguez*, 6 AD3d 813, 816 (3d Dept 2004); *Matter of Shepard*, 286 AD2d 336, 337(2d Dept. 2001); *Romero v City of New York*, 260 AD2d 461 (2d Dept 1999; see *Matter of Abdur-Raheem v Mann*, 85 NY2d 113, 124 1985). The hearing officer, after consulting with unnamed and unidentified superiors, denied the request for the adjournment the hearing. As the hearing officer acknowledged at the hearing, the telephone format was not ideal, but it was the best format available. The hearing officer further found that an adjournment or postponement was not in petitioner's interest, without stating why that was so.

The delay would be chargeable to Petitioner. It would not affect or undermine the legality of the hearing. Petitioner by seeking the adjournment could not later complain of it or any prejudice to him. Nor would the short adjournment prejudice DOCCS. It would be within the range of adjournments granted to DOCCS in other matters. Petitioner had proposed a reasonable remedy that he would wait in jail for about a month for his hearing. The right to and the capacity to extend the tie beyond the fifteen-day statutory timing of the hearing was a right of Petitioner not of DOCCS.

The request for the adjournment was in fact in Petitioner's interest, to prevent misidentification. An adjournment, given the representations of the video's imminent availability by Assistant Commissioner, would be in the best interest of Petitioner. Petitioner's adjournment and request to wait until the video component was in place was a reasonable request considering the constitutional, statutory and rules violations of the due process rights of Petitioner. The unnamed officers with whom the hearing officer consulted who rejected the request demonstrate either that the denial was arbitrary and capricious or that DOCCS itself had no faith that visual portion of the hearing would happen on the schedule asserted, if at all. In the absence of an explanation for the denial, a due process violation may be inferred.

SUFFICIENCY OF EVIDENCE

A preliminary parole revocation hearing is intended to be summary in nature. *People ex rel. Korn v NYS Div of Parole*, 274 AD2d 439 (2d Dept. 2000). Minimal inquiry is necessary to determine whether there is probable cause to believe that parolee has committed or failed to commit the acts required of him to maintain that he has not followed the conditions of his parole. There is no statutory requirement or regulation that DOCCS prove each element of the charge

in the Violation of Release Report. See *People ex rel. Daniel v Warden*, Index# 252502. (Sup Ct Bronx Cty. 2009) (Benitez, J). The preliminary hearing is “intended to be informal and summary in nature, with only a ‘minimal inquiry’ necessary to determine whether there is probable cause or reasonable grounds to believe that the parolee has committed acts that would constitute a violation of parole conditions.” *People ex rel. Calloway v. Skinner*, 33 NY2d 23, 31 (1973).

At the preliminary hearing, the parolee’s parole officer must establish probable cause that a violation of a parole condition in an important respect occurred. N.Y. Exec. Law § 259-i(3)(c)(i) & (iv). No matter how minimal due process is afforded, there still is a minimum quantum of evidence required to support the charge that the violation committed is in an important respect. *Calloway*, 33 NY2d 23 (1973). See also *People ex rel. Watson by Jarff v Commissioner*, 145 AD 2d 120 (1 Dept 1989).

The system that DOCCS uses i.e., no video, imposes proof problems on them as it does Petitioner. The issue becomes given the format, has DOCCS sufficiently proven identity of parolee by the evidence in the hearing. Unlike *Crawly*, supra, this matter was not in Petitioner’s home. It was a push in robbery. Complainant selected a photograph out of a group of photographs. The hearing officer did not see the photograph and it was not entered into evidence. The complainant did not know the name of the man with the gun until he was told Petitioner’s name by a police officer after complainant picked out a photograph. Without the ability for complainant to see Petitioner, relying on a photograph that only complainant saw, it is only by a leap of faith that the correct person was selected. Skipping over the issue of actual identity as to who is the perpetrator who stole the complainant’s cash. in is this the perpetrator undermines probable cause.

There is no means to be assured as to whether Michael Garcia was identified by evidence in the hearing without a video component. DOCCS fails to see the cost of their adherence to the format that eliminates face to face confrontation.

IDENTIFICATION IN A PRELIMINARY HEARING

In the instant matter the hearing officer conceded that even though there is an issue regarding identification, probable cause was found. The evidence was that complainant at the police station was showed a number of photographs. Complainant did not know the name of the person whose photograph he picked out, the police officer told him it weas Michael Garcia and complainant repeated

that name at the hearing. Neither he nor the hearing officer could see the parolee at the hearing.

The identification itself was based upon a short viewing, while having a gun pointed at him. Complainant said he recognized the person in the photo from the neighborhood. The hearing officer was never shown the photograph. The record has no actual basis to identify this Michael Garcia as the perpetrator. While it is inferable that the photo array was proper but in the absence of face-to-face confrontation, it is difficult to see how this format imposed by DOCCS establishes only that the identification is at best incomplete and at worst, the wrong person. See *People v. Ruffino*, 110 A.D.2d 198, 202 (2d Dept. 1985).

Asserting that a preliminary hearing need only be more than a formality and asserting that the presumption of innocence is not available, which it is not, Respondents point out that probable cause is not as exacting as required in a final hearing, Respondents elide over the issue of whether a parolee has a due process right to demand the introduction of evidence that identifies the parolee as the person charged and whether DOCCS can prove that fact. Respondents state there is no genuine issue of identification, despite the hearing officer's remark that there may be an issue of identification, it appears that the issue is genuine. Respondents completely skew the facts of *Crawley*, supra. In *Crawley*, the parolee was in his own house when he ended up charged with a violation. In this case the attacker came from outside and was unknown to the complainant. Complainant picked out a photograph of a person he recognized as the attacker. The police told the complainant the name of the person on the photograph.

Respondents assert that when Petitioner's lawyer asked a question as to when he was arrested, the lawyer's questioning as to an arrest showed that Petitioner was the person arrested. While a party can be bound by a lawyer's representations, it is axiomatic that the question taken with the answer is evidence, not the lawyer's question alone. The issue in the case was not whether Petitioner was arrested, the issue was is Petitioner the person that committed the act in question. Respondents claim that from the question, it can be inferred that Petitioner is the perpetrator This court disagrees. There was no showing of a reasonable probability that Petitioner. was the robber since the photograph was not in evidence. The fact of arrest does not establish the commission of the crime, especially if the arrest is dependent upon a felony complaint as opposed to a voted indictment. Petitioner had not been indicted at the time of the preliminary hearing.

Respondents' claim of a reasonable probability is missing a logical link. There is no evidence that the man in the photograph selected by complainant was this Petitioner. Respondents claim that there is an inference, but this leap of logic goes too far. Here the issue is not identification in the criminal context, but identification is the pure factual context. This is a failure of proof is exacerbated by the methodology of teleconferencing. Respondents cite the pandemic and the excusing of an eight-year-old child from being required to identify the defendant to meet the requirement of following CPL 180.80 in *People ex rel. Scott* on behalf of *Gonzalez-Leal v. Brann*, 68 Misc. 3d 565 (Sup. Ct. Kings Cty 2020). No one raised the possibility of a video component in *Gonzalez-Leal*. A preliminary hearing would require the eight-year-old complainant to see and testify against the person that she alleges engaged in sexual intercourse with her. This child victim would be required to identify him and be subjected to cross-examination. If a grand jury could be empaneled this child would not be placed in that situation. Through no fault of anyone, the COVID-19 pandemic does not currently allow for the empaneling of a grand jury. *People ex rel. Scott* on behalf of *Gonzalez-Leal v. Brann*, 68 Misc. 3d at 568. Thus, good cause was measured by the harm to the witness and the status of COVID. The suggestion that good cause in light of CPL 180.80, governed by a particular Executive Order is analogous to the situation here is misplaced. There is no Executive Order that suspended DOCCS from expeditiously moving to video hearings like the criminal courts.

Cumulatively, the manner and conduct of the hearing, particular to this Petitioner, violated his right, under the state constitution, the applicable statute, and the rules of the agency, confront and cross examine the sole witness against him. Again, this ruling does not hold that every person whose hearing was held by telephone without a visual component had their Sixth Amendment rights violated, but solely that under the particular set of facts as to the conduct of this Petitioner 's hearings, they did not comport with due process.

In the instant matter Petitioner demonstrated from the record that he was prevented from confronting the sole fact witness against him on the issue of identity "[G]iven the difficulty in assessing the application of constitutional safeguards in the context of parole revocation, it is appropriate to regard the procedural requirements contained in the [Executive Law] as representing the minimum procedural due process which must be afforded to the parolee." (*People ex rel. Watson*, 149 AD2d at 125 (emphasis added); accord *People ex rel. Walker v. Warden of Rikers Is. Correctional Facility*, 162 AD2d 107 (1st Dept 1990).

Nothing permits DOCCS to void video conference hearings for the duration of that suspension. DOCCS inability to do what must be done to provide face to face hearings to Petitioner more than a year after the necessity for audio visual hearings became patent deprives Petitioner of due process. If for no other reason, DOCCS provides no real credible reason why it could not follow the court system's example. Rather the explanation demonstrates a lack of urgency can no longer excuse the curtailment of Petitioner's rights.

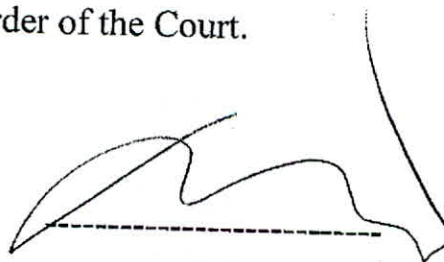
In light of this determination, Petitioner's other claim need not be reviewed.

The warrant is vacated.

This constitutes the decision and order of the Court.

Dated May 3, 2021

Bronx, New York

A handwritten signature in black ink, appearing to read 'DAVID L. LEWIS', written over a horizontal dashed line. The signature is stylized and cursive.

DAVID L. LEWIS, ASCJ