

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

T.H.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D20-3217

November 4, 2022

BY ORDER OF THE COURT:

Pursuant to this court's motion, rehearing is granted. The prior opinion dated March 18, 2022, is withdrawn, and the attached opinion is issued in its place. The State's motion to accept the amended motion for rehearing, rehearing en banc, or certification is granted. The request for rehearing in the amended motion is denied as moot. The requests for certification and for rehearing en banc are denied.

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.

MARY ELIZABETH KUENZEL
CLERK

DISTRICT COURT OF APPEAL OF FLORIDA
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No. 2D20-3217

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Appeal from the Circuit Court for Hillsborough County; Thomas N. Palermo, Judge.

Howard L. Dimmig, II, Public Defender, and Blair Allen, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Helene S. Parnes, Senior Assistant Attorney General, Tampa, for Appellee.

CASANUEVA, Judge.

T.H. appeals an order withholding adjudication of delinquency after he was found to have committed the offense of carrying a

concealed firearm following a bench trial. He argues that the trial court erred in ordering his adjudicatory hearing to proceed entirely via Zoom because it improperly impacted his constitutional rights to confront witnesses, effective assistance of counsel, and due process. He also asserts that the trial court erred in denying his motion to suppress.

We conclude that proceeding via Zoom improperly impacted T.H.'s constitutional right to confront witnesses under due process of law where the trial court did not allow T.H. a hearing on his objection and without making a case-specific finding of necessity to limit confrontation rights. We do not find merit in the other issues T.H. raises on appeal. Accordingly, we reverse.

This appeal examines the right to in-person confrontation and the public health need to avoid or limit the spread of COVID-19 in our population. We stress that our determination is limited to the narrow facts presented here.

I. FACTS

On February 19, 2020, a petition for delinquency was filed alleging that T.H. committed two counts of carrying a concealed firearm, one count of resisting an officer without violence, and two

counts of a minor in possession of a firearm. The trial court ordered T.H.'s adjudicatory hearing to proceed entirely via Zoom.

T.H. filed an "Objection to Holding Felony Non-Jury Trials Via Zoom," in which he argued that a remote hearing would violate his constitutional rights to confrontation, effective assistance of counsel, and due process. After reviewing T.H.'s written objection and the State's response, the trial court issued an "Order Overruling The Child's Objection To Conducting An Adjudicatory Hearing By Zoom Or Other Remote Means." The order listed several administrative orders which allowed the trial court to hold adjudicatory hearings via Zoom.¹ Ultimately, the trial court determined that the COVID-19 pandemic permitted the court to

¹ The trial court cited to Florida Supreme Court's Administrative Order AOSC20-23, Amendment 7; Florida Supreme Court's Administrative Order AOSC20-32, Amendment 3; and the Thirteenth Judicial Circuit Court's Administrative Order S-2020-044 (Continuity of Court Operations & Judicial Proceedings During COVID-19 Mitigation Efforts - Transitioning from Phase 1 to Phase 2). We highlight that the guiding principle in every administrative order released by the Florida Supreme Court is that "[t]he presiding judge in all cases must consider the constitutional rights of crime victims and criminal defendants and the public's constitutional right of access to the courts." *In re Comprehensive COVID-19 Emergency Measures for the Florida State Courts*, Fla. Admin. Order AOSC20-23, Amend. 7 (Oct. 2, 2020).

deny T.H.'s right to confront witnesses in person. In overruling the child's objection to conducting the adjudicatory hearing by Zoom, the trial court noted:

- After six months, public health-driven restrictions were easing;
- The Thirteenth Judicial Circuit transitioned to Phase 2 on August 31, 2020;
- Jury trials began on October 19, 2020;
- The courtrooms were not configured for social distancing;
- The court had been encouraged to employ technology and avoid unnecessarily bringing people into the courthouse;
- Most in-person hearings would require specific findings be made as to why it was being conducted in person; and
- The child asserted that an adjudicatory hearing by videoconference would violate his right to confrontation, as well as other constitutional claims.

The court conducted the adjudicatory hearing on October 30, 2020, where all parties appeared via Zoom. The trial court found T.H. delinquent on one count of carrying a concealed firearm, withheld adjudication, and placed him on probation until he reaches nineteen years of age. This appeal ensued.

II. DISCUSSION

A. Juvenile Delinquency Proceedings

To determine whether T.H.'s due process right to confrontation was violated, we apply a de novo standard of review. *Lilly v. Virginia*, 527 U.S. 116, 137 (1999), *abrogation on other grounds recognized by United States v. Smalls*, 605 F. 3d 765, 772-73 (10th Cir. 2010).

We start by discussing the history behind the development of the current juvenile justice system. In the beginning, juveniles were not afforded the same protection from criminal prosecution they are today.² During the shift to the modern juvenile justice system, it

² It must be recalled that at the time of our nation's founding the juvenile justice system as we now know it did not exist. Rather, in most jurisdictions the common law operated to provide a presumption regarding the age of criminal responsibility. George L. Clark, *Summary of American Law* 131 (1949).

Under the English Common Law there existed a conclusive presumption that a child under the age of seven was incapable of committing a crime. *Id.*; *see also In re Gault*, 387 U.S. 1, 16 (1967). Other youths were dealt with by the criminal justice system. *In re Gault*, 387 U.S. at 16. In their criminal prosecution, the child would be entitled to the rights identified within the Sixth Amendment, including the right to counsel and the right to confront the witnesses testifying against the accused child. *Id.* at 16-17.

Because a child could, at the time, be incarcerated, the child faced a loss of their liberty. That liberty, now protected by the Due Process Clause, was not created through the Bill of Rights. While

was established that children ought to be treated differently than adults. As a result, the courts were tasked with ascertaining what rights a child facing delinquency prosecution may have.

In *In re Gault*, 387 U.S. 1, 13-14 (1967), the Court accepted the proposition that the Due Process Clause of the Fourteenth Amendment has a role to play in the relationship between a juvenile and the State but the Court was tasked with determining its precise impact. The Court concluded that through the Due Process Clause of the Fourteenth Amendment, children facing delinquency prosecution have many of the same legal rights as adults in criminal proceedings, including the right to counsel, the right to

not being a constitutional or statutory test, we are reminded that our Founders' idea of liberty was recognized before the Constitution. As the Declaration of Independence states, we "are endowed by [our] Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." See Declaration of Independence.

Presently, our statutory scheme for juveniles speaks not of incarceration but of detention. But detention is operationally identical to incarceration in the respect that it is a loss of liberty. If today's juvenile justice system is to be fundamentally fair, we envision that such a system includes at a basic minimum the right to counsel who is entitled to act as counsel by exercising the ability to cross-examine those witnesses against the juvenile in person as discussed *infra*.

notice, and the right to confront witnesses. *Id.* at 31-57; *see also Schall v. Martin*, 467 U.S. 253, 263 (1984) (reasoning that certain basic constitutional protections enjoyed by adults accused of crimes also apply to juveniles, including notice of charges, right to counsel, privilege against self-incrimination, right to confrontation, right to demand the State prove crime proof beyond a reasonable doubt, and protections against double jeopardy). The Court also acknowledged that the different treatment of juveniles is permitted if the delinquency proceeding remains fundamentally fair.

In *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971), the United States Supreme Court declined to apply the right of a jury trial to a juvenile proceeding. While the *McKeiver* Court declined to apply the right to a juvenile proceeding, the Court again noted that the Due Process Clause has a role to play in juvenile proceedings. *Id.* at 541. When addressing due process concerns in juvenile proceedings, the Supreme Court stated that the goal is to achieve "fundamental fairness" with an "emphasis on factfinding procedures." *Id.* at 543. "The requirements of notice, counsel, confrontation, cross-examination, and standard of proof naturally flow[] from this emphasis." *Id.*

McKeiver does not hold that all rights held by a juvenile can be limited or abrogated categorically as long as the proceeding is fundamentally fair and a sufficient necessity exists. The *McKeiver* Court reasoned that a jury is not necessary to ensure accurate factfinding and therefore not necessary to satisfy the requirements of a fundamentally fair proceeding pursuant to the Due Process Clause of the Fourteenth Amendment. *Id.* However, certain basic procedural safeguards found in criminal proceedings and afforded to a child in a juvenile proceeding, including the right to confront witnesses, are essential to due process and fair treatment and therefore necessary to satisfy the requirements of a fundamentally fair proceeding. *See Coy v. Iowa*, 487 U.S. 1012, 1019-20 (1988) (recognizing that the right to confrontation is "essential to fairness" and helps to "ensure the integrity of the fact-finding process").

Our state constitution recognizes that a child is to be charged, in most instances, with an act of delinquency. In part, article 1, section 15(b), of the Florida Constitution states: "When authorized by law, a child as therein defined may be charged with a violation of law as an act of delinquency instead of crime and tried without a jury or other requirements applicable to criminal cases."

The text of this constitutional provision clearly establishes that proceedings, like the one presently before this court, are not criminal proceedings. Instead, it is a proceeding to determine whether an act of delinquency occurred.

We highlight this distinction because the text of the Sixth Amendment to the United States Constitution provides: "*In all criminal prosecutions*, the accused shall enjoy the right to a speedy and public trial, . . . to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defence." (Emphasis added.)³ Thus, we further emphasize that the confrontation right afforded by our national and state constitutions is not implicated here. It is the Due Process Clause of the Fourteenth Amendment that is of importance.

It also merits observing that the Florida Rules of Juvenile Procedure provide for the use of closed-circuit television in limited

³ A similar provision is found in our state constitution. It provides: "In all criminal prosecutions the accused . . . shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses. . . ." Art. I, § 16(a), Fla. Const.

circumstances. Florida Rule of Juvenile Procedure 8.104(a) provides:

In any case the trial court may order the testimony of a victim or witness under the age of 16 to be taken outside the courtroom and shown by means of closed-circuit television if on motion and hearing in camera, the trial court determines that the victim or witness would suffer at least moderate emotional or mental harm due to the presence of the defendant child if the witness is required to testify in open court.

Although this rule is not dispositive here, it does provide a crucial insight into the utilization of closed-circuit television. Not only does the rule require a "motion and hearing in camera," it mandates a duty upon the trial court to "make specific findings of fact on the record as to the basis for its ruling under this rule." Fla. R. Juv. P. 8.104(e). The requirement of case specific findings is demanded.

B. Limits of Confrontation Clause

Having established that the right to confrontation is a component of due process of law and essential to fairness in juvenile proceedings, we now discuss the abilities confrontation confers. Certainly, it permits the ability of one "to confront the witness physically." *Davis v. Alaska*, 415 U.S. 308, 315 (1974). It

also secures the right of cross-examination. "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Id.* at 316.

However, the right of confrontation has not yet been held to be absolute. "We have never held, however, that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial." *Maryland v. Craig*, 497 U.S. 836, 844 (1990). It follows then that in a juvenile proceeding this right is not expanded by operation of the Due Process Clause.

In part, the trial court's order relied upon *Craig*. The issue in *Craig*, as identified by the Supreme Court, was "whether the Confrontation Clause of the Sixth Amendment categorically prohibits 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." 497 U.S. at 840. In the instant case, our focus is different. We examine the impact of

the Court's rationale upon the use of technology in all juvenile trials during COVID-19.⁴

Because the purpose of the Confrontation Clause is to ensure that the trier of fact has the satisfactory means to evaluate the truthfulness of a witness's trial testimony, the Confrontation Clause provides a number of assurances. Among the assurances are:

1. the entitlement of the accused to a personal examination of the witness;
2. the witness statement will be under oath;
3. the witness may be forced to submit to cross-examination; and
4. the jury or fact finder is permitted to observe the demeanor of the witness.

⁴ At least one then-member of the Supreme Court carved out a view on virtual proceedings and their effect on the Confrontation Clause. In an accompanying statement to the Order of the Supreme Court regarding proposed amendments to Federal Rule of Criminal Procedure 26(B), Justice Scalia opined that the proposed rule was contrary to *Craig*. Justice Scalia observed:

[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.

207 F.R.D. 89, 94 (2002) (statement of Scalia, J.).

See *Craig*, 497 U.S. at 845-46.

Despite the benefits these assurances provide, a literal reading of the clause is not required. Rather, the Court noted that precedent reflected only a *preference* for face-to-face confrontation at trial. *Craig*, 497 U.S. at 849. Despite being a preference, it is not easily dispensed with. To overcome the constitutional preference, *Craig* requires that we ask "whether use of the procedure is necessary to further an important state interest." 497 U.S. at 852. The Court determined that the use of closed-circuit television can further an important state interest. In *Craig*, it protected alleged victims of child abuse from further trauma.

Further, *Craig* mandates that the judicial finding of necessity be case-specific, that is, "necessary to protect the welfare of the particular child witness who seeks to testify." *Id.* at 855. The harm must be more than de minimis. *Id.* at 856.

The application of *Craig* was considered on rehearing en banc by the Eleventh Circuit in *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006). The case involved a criminal prosecution for mail fraud and money laundering, among other charges. *Id.* at 1309-10.

At trial the government sought an order permitting two witnesses located in Australia to appear and provide testimony by live, two-way video conference. *Id.* at 1310. The witnesses were unwilling to travel to the U.S. and were beyond the subpoena power of the government. *Id.*

The Eleventh Circuit made two salient points relevant to our analysis in the instant case. First, "confrontation through a video monitor is not the same as physical face-to-face confrontation." *Id.* at 1315. The Sixth Amendment right to confront one's accuser is compromised when an electronic medium is used. *Id.*

The second point is procedural. Before departing from the usual procedure, the court must hold an evidentiary hearing and determine whether it is necessary to deny face-to-face confrontation in order to further an important public policy. *Id.* This determination must be made on a case-by-case basis. *Id.*

C. Burden of Proof

We recognize that the due process right asserted belongs to T.H. and not to the State or the trial court. The burden of persuasion is upon the party seeking to abrogate the preference for physical face-to-face confrontation. The burden is not upon T.H. to

raise a case specific reason why a videoconference is inappropriate. Nor is it a relevant consideration that a videoconference may enhance the ability of the trier of fact to perform its duty.

Having determined that the burden of overcoming the constitutional preference rests with the government, the next demand is determining what must be established. *Craig* provides that the movant must establish a case specific necessity that defeats the constitutional preference. The necessity claimed by public policy cannot be de minimus.

To reach a determination of necessity, the "trial court must hear evidence." *Craig*, 497 U.S. at 855. In cases such as this, the inquiry should ask whether the use of the video system is necessary to protect the welfare of those impacted by holding the adjudicatory hearing at its indicated location.

The record reflects that no hearing was held in this case. As a result, there is no evidence of a necessity that suffices to overcome the constitutional preference of face-to-face confrontation provided by the Confrontation Clause of the Sixth Amendment and made applicable to juveniles through the Due Process Clause in the Fourteenth Amendment.

Additionally, we observe that the trial court order indicated that the Thirteenth Judicial Circuit had resumed holding in-person felony jury trials. Yet, the order failed to offer any analysis as to why a jury trial could afford the accused a right to in-person confrontation but a juvenile adjudicatory hearing held without the presence of a jury could not.

III. CONCLUSION

We conclude, under the circumstances presented here, the trial court improperly impacted T.H.'s constitutional right to confront witnesses under due process of law without allowing T.H. a hearing on his objection and without making a case-specific finding of necessity to limit confrontation rights.

We note that in *E.A.C. v. State*, 324 So. 3d 499, 507 (Fla. 4th DCA 2021), the Fourth District held that the remote bench trial in that case did not violate E.A.C.'s due process or confrontation rights. It is also important to note that, contrary to the dissent's position, the Fourth District indicated that *Craig* was applicable to juveniles, stating that "the preferred procedure in the present case would have been for the trial court to at least attempt to make some type of a 'case-specific finding' allowing for the questioning of

witnesses by Zoom" *Id.* at 508 (Levine, C.J., specially concurring). However, the Fourth District concluded that the juvenile's right to confront witnesses was not violated given "the pandemic circumstances that existed in August 2020." *Id.* at 507. We believe that there are important factual distinctions between *E.A.C.* and the instant case.

First, the trial court in *E.A.C.* conducted a hearing on the child's objection to having witnesses appear via Zoom. 324 So. 3d at 501. While this court cannot determine whether the inquiry at that hearing focused on whether the use of the video system was necessary, it is a required procedural step that was not afforded to T.H. Second, when the trial court in *E.A.C.* made the determination to have witnesses appear via Zoom, the Fifteenth Circuit was still in Phase 1 of the Florida Supreme Court's Administrative Order.⁵ *Id.* at 507-08 (Levine, C.J., specially concurring). We agree that preventing the spread of COVID-19 is an important public policy

⁵ During Phase 1, court facilities were effectively closed to the public, and in-person proceedings were rare. *In re* Comprehensive COVID-19 Emergency Measures for the Florida State Courts, Fla. Admin. Order AOSC20-23, Amend. 7 (Oct. 2, 2020).

and conducting trials remotely would certainly further that policy. However, the argument that the trial court need not make a case-specific finding because the country was in the midst of a pandemic does not hold up in the instant case when the trial court itself admits that public health driven restrictions were easing and jury trials were being conducted down the hall.⁶

⁶ During the pendency of the State's motion for rehearing, the Third District issued two opinions regarding whether a trial court must render a case-specific finding of necessity before ordering a juvenile adjudicatory hearing to proceed remotely.

In *J.T.B. v. State*, No. 3D21-0537, 2022 WL 2334940, at *1 (Fla. 3d DCA June 29, 2022), a consolidated appeal, each juvenile objected to remote witness appearances and requested to appear in court. *Id.* The objections were overruled because COVID-19 "presented an ongoing threat to the public health." *Id.* The Third District reasoned that the right to notice, counsel, confrontation, cross-examination, and standard of proof are "implicit in achieving the laudatory goal of 'fundamental fairness' in adjudications of delinquency." *Id.* (citing *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971)). And that "[t]he right to confrontation existed long before the constitution that enshrined it, and there is no clear distinction between confrontation rights under the Sixth Amendment and those emanating from due process." *Id.* at *4 (citing *Crawford v. Washington*, 541 U.S. 36, 43 (2004)). The Third District concluded that "due process considerations require case-specific findings of necessity in such circumstances." *Id.* at *1.

In *M.D. v. State*, No. 3D21-1147, 2022 WL 2334996, at *1 (Fla. 3d DCA June 29, 2022), the juvenile's adjudicatory hearing was scheduled to proceed via Zoom on March 8, 2021. The juvenile filed a written objection arguing that a remote trial would violate his right to be present and his right to confront witnesses. *Id.* The trial court overruled his objection and all parties appeared remotely. *Id.*

Finally, our holding in the instant case does not reach the issue of whether conducting an adjudicatory hearing via Zoom is unconstitutional. Our holding is confined to the procedure which the trial court followed in determining whether it was appropriate to abrogate T.H.'s due process right to confront witnesses.

We pause here to briefly summarize our conclusion and its impact upon the legal relationship between the State and a juvenile defendant. Case law establishes that a child is entitled to a fundamentally fair delinquency proceeding pursuant to the Due Process Clause of the Fourteenth Amendment. To satisfy the basic requirements of a fundamentally fair proceeding, a child has a right, albeit not absolute, to confront witnesses in person. Due process of law demands that the party seeking to restrict the child's right to confront witnesses in person bears the burden of

at *2. In reversing the trial court's decision, the Third District reasoned that "[e]arly in the pandemic, courts were more likely to weigh the public policy concerns surrounding public health and the pandemic in favor of allowing remote proceedings. . . . However, the longer the pandemic lasts, the more demanding courts have become." *Id.* at *4. The Third District concluded that "at this point in the pandemic, due process requires a case-specific finding of necessity before a trial court may conduct a remote adjudicatory hearing over objection. . . ." *Id.* at *5.

persuasion. An evidentiary hearing with both parties present affords the trial court the opportunity to evaluate and weigh evidence adduced.⁷ Based on the evidence, the trial court must determine whether a case-specific necessity exists so that the preference for face-to-face confrontation may be abrogated and witnesses may be permitted to appear via Zoom.

Accordingly, we reverse the order withholding adjudication of delinquency and remand for a new adjudicatory hearing. On remand, the adjudicatory hearing may be held via Zoom if the trial court holds a hearing on T.H.'s objection and makes a case-specific finding of necessity before limiting his confrontation rights.

Reversed and remanded for further proceedings consistent with this opinion.

SILBERMAN, J., Concurs.

ATKINSON, J., Dissents with opinion.

⁷ We also note that an evidentiary hearing will provide a transcript of the proceeding and demonstrate the issues which have been properly preserved, aiding appellate judges in reviewing the issues before them.

ATKINSON, Judge, Dissenting.

I respectfully dissent because controlling legal authority does not demand that a trial court conduct a hearing and make case-specific findings of necessity before depriving a juvenile of the in-person aspect of his right to be confronted by the witnesses against him. To the contrary, because juvenile delinquency adjudicatory hearings are not subject to the constitutionally enumerated confrontation right applicable only in criminal proceedings, the trial court here was permitted to make a categorical finding that necessity demanded that juveniles only be permitted to confront witnesses against them remotely through two-way audio-visual technology.

As the majority acknowledges, it has long been established that juveniles accused of crimes can be treated differently than adults. A reasonable person might presume that a proceeding in which an accused is facing charges that he violated a criminal statute (i.e., committed a crime) for which he could be punished by the deprivation of his liberty would be considered a *criminal* proceeding, no matter the age of the accused. However, the people of Florida have spoken on that matter, and they saw fit to authorize

the legislature to designate such proceedings as something other than criminal. See art. I, § 15(b), Fla. Const. ("When authorized by law, a child as therein defined may be charged with a violation of law as an act of delinquency instead of crime and tried without a jury or other requirements applicable to criminal cases."). As such, the question of whether a proceeding legislatively denominated as *delinquency* and not criminal is governed by the Confrontation Clause has been answered in the negative and cannot be revisited here. See § 985.35(1)(a), (2), Fla. Stat. (2020) ("[T]he adjudicatory hearing must be held as soon as practicable after the petition alleging that a child has committed a delinquent act or violation of law is filed Adjudicatory hearings shall be conducted without a jury by the court"); art. I, § 16(a), Fla. Const. ("In all *criminal* prosecutions the accused . . . shall have the right . . . to confront at trial adverse witnesses" (emphasis added)).

Equally important for the purposes of this case is that the Supreme Court of the United States has made it clear that the Sixth Amendment—which includes an enumerated right to confront witnesses—does not apply to juveniles. See *McKeiver v.*

Pennsylvania, 403 U.S. 528, 541 (1971) (recognizing that the Sixth

Amendment does not apply to children in juvenile delinquency proceedings because such proceedings are not "criminal prosecutions"). The Supreme Court has recognized, however, that juvenile defendants have a right to a fundamentally fair hearing pursuant to the Due Process Clause of the Fourteenth Amendment. *Id.* at 543 ("[T]he applicable due process standard in juvenile proceedings . . . is fundamental fairness. . . . [with] an emphasis on factfinding procedures."). Nonetheless, the Court concluded that juveniles could be legislatively denied jury trials without offending the Due Process Clause—i.e., they could be categorically denied a right afforded to adult criminal defendants without an evidentiary hearing and a case-specific finding that a necessity exists that is sufficient to justify limitation or abrogation of the right. *See id.* ("[W]e conclude that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement.").

The majority concludes that the trial court must provide juvenile defendants with an evidentiary hearing and case-specific findings before limiting their right to confront witnesses based on its reading of *McKeiver* and *Maryland v. Craig*, 497 U.S. 836 (1990). Unlike adult criminal defendants, juveniles' rights can be limited or

abrogated categorically as long as the proceeding is fundamentally fair and there is a sufficient necessity to justify the limitation. See *McKeiver*, 403 U.S. at 532, 543. In *Craig*, the Supreme Court concluded that the constitutionally guaranteed right to in-person, face-to-face confrontation of adverse witnesses could be suspended, but only based on an individualized, case-specific finding of necessity made after an evidentiary hearing. *Craig*, 497 U.S. at 857. By contrast, this case deals with a juvenile's unenumerated right to confront witnesses against him, which derives from the Fourteenth Amendment Due Process Clause's fundamental fairness requirement. See *McKeiver*, 403 U.S. at 532, 543.

In *Craig*, the Supreme Court decided "whether the Confrontation Clause of the Sixth Amendment categorically prohibits 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." *Craig*, 497 U.S. at 840. The Court did not address the Fourteenth Amendment fundamental fairness inquiry or juvenile delinquency proceedings. Rather, the Court sanctioned an almost complete deprivation of a right of criminal procedure enumerated in the Constitution when it

allowed an adult defendant to settle for one-way, closed-circuit television monitoring of a witness examination being conducted outside his presence.

Contrary to the majority's insistence, it does not follow that because an adult must be afforded a hearing and case-specific findings of necessity before his enumerated confrontation right is all but eviscerated, a juvenile—whose unenumerated confrontation right must only meet the standard of fundamental fairness—must also be afforded a hearing and case-specific findings when he is only being deprived of the in-person aspect of his confrontation right. It has already been established that the deprivation of a constitutionally mandated criminal procedural right can be denied to juveniles categorically as opposed to case-specifically. *See McKeiver*, 403 U.S. at 541, 545 (recognizing that Sixth Amendment rights "did not automatically and peremptorily apply" in juvenile proceedings and concluding that juvenile defendants do not have a right to trial by jury in delinquency proceedings); art. I, § 15(b), Fla. Const. (depriving all juveniles of the right to a jury trial and "other requirements applicable to criminal cases"). And it is of no matter that the right to confrontation has been recognized as more integral

to the truth-seeking process than the right to a jury trial. See *McKeiver*, 403 U.S. at 543 ("[In determining fundamental fairness,] we have an emphasis on factfinding procedures. The requirements of . . . confrontation [and] cross-examination . . . naturally flowed from this emphasis. But one cannot say that in our legal system the jury is a necessary component of accurate factfinding. There is much to be said for it, to be sure, but we have been content to pursue other ways for determining facts."). No authority establishes that the relative importance of the right to confrontation distinguishes it as being invulnerable to any erosion in juvenile proceedings without establishment of a case-specific necessity after an evidentiary hearing. To the contrary, bound as we are by precedent allowing categorical denial of jury trials to all juveniles, we must examine to what extent other criminal procedural rights can be categorically denied to juveniles in the face of necessity. Unlike the total deprivation of jury trials to minors in *McKeiver* and the complete elimination of the right to actually *confront* adverse witnesses face-to-face in *Craig*, this case does not present anywhere near a complete deprivation of the confrontation right. Rather, the juvenile enjoyed face-to-face, two-way, real-time confrontation even

though it was not physically in person. And while a case-specific finding of necessity made sense in *Craig*—where the policy consideration was whether an individual victim witness would be unable to testify in the presence of the defendant or could only do so at an intolerable cost to her well-being—the necessity here—a worldwide pandemic—is anything but case-specific. Whatever dangers are posed by the contagion are generally applicable and present potential effects more or less equally to parties, witnesses, lawyers, bailiffs, and other court personnel. As such, fault cannot be found in the trial court's decision to apply the type of categorical deprivation sanctioned in *McKeiver* on a temporary basis to only one aspect of juveniles' right to confront the witnesses against them.

But even presuming for the sake of analysis that the demands announced in *Craig* apply to the unenumerated confrontation rights that the Due Process Clause provides to juveniles in delinquency proceedings, the holding of *Craig* would not necessarily require a trial court to conduct an evidentiary hearing and make case-specific findings to justify the limitation of the confrontation right imposed on T.H. The *Craig* opinion itself indicates that it does not require

an evidentiary hearing and case-specific findings for every conceivable limitation on an adult criminal defendant's right to face-to-face confrontation. *See Craig*, 497 U.S. at 847–48 ("[W]e have never insisted on an actual face-to-face encounter at trial in *every* instance in which testimony is admitted against a defendant. Instead, we have repeatedly held that the Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial.").

In *Craig*, the State sought to have a child witness in a child abuse case testify *outside of the defendant's physical presence* by *one-way*, closed-circuit television, and the Court determined that such an extensive deprivation of the Sixth Amendment confrontation right requires an evidentiary hearing and case-specific findings that limitation of the accused's right to face-to-face confrontation is necessary to further an important state interest. *Craig*, 497 U.S. at 855 ("[W]e hold that, if the State makes an adequate [case-specific] showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special

procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant."). Here, we are presented with the question of whether a juvenile who was afforded *face-to-face, two-way* confrontation by remote audio-visual technology can be denied the right to *in-person, face-to-face* confrontation based solely on his status as a juvenile defendant. Logic does not dictate that the strictures required in the former must also apply in the latter.

The trial court had the specific authority to hold remote adjudicatory hearings pursuant to several Florida Supreme Court Administrative Orders. Relying on these orders, the trial court described in detail the necessity it concluded was sufficient to justify the limitation of the right to in-person confrontation in juvenile delinquency proceedings and explained its conclusion that elimination of the in-person aspect of T.H.'s confrontation right did not deprive him of his rights to a fundamentally fair proceeding or to face-to-face confrontation and cross-examination of witnesses. The trial court made extensive, specific findings but categorically applied the suspension of the in-person aspect of the confrontation right on the basis of the accused's status as a juvenile.

In a legal world in which constitutionally mandated procedural safeguards guaranteed to adult criminal defendants can be denied to juveniles accused of committing crimes, it stands to reason that restoring in-person criminal trials for adults *could* be prioritized over restoration of in-person juvenile delinquency hearings presuming that exigencies reasonably supported the necessity for a cautious restoration of the status quo. The Florida Supreme Court had not only authorized such action but demanded by order that trial courts consider whether such measures were necessitated in light of the ongoing emergency. No matter the importance I might personally ascribe to the constitutional right of individuals—regardless of age—to be confronted with the witnesses against them before being adjudicated of having committed crimes and deprived of their liberty, I am no more in a position to question administrative orders of the Florida Supreme Court than I am to question binding precedent of the United States Supreme Court. And I perceive no allowable basis to second-guess the trial court's determination that deprivation of the in-person aspect of confrontation did not compromise fundamental fairness and was necessitated by detailed factual findings that we as an appellate

court are not in a position to scrutinize. T.H. can point to no established right that overrides the trial court's authority to deny him an in-person adjudicatory hearing on the basis of his status as a juvenile after the decisionmakers of the judicial branch of state government had announced that emergency public policy considerations created the necessity upon which the denial was based and delegated the ultimate decision-making to the trial court. As such, I would affirm.

Opinion subject to revision prior to official publication.