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## Confronting the Confrontation Clause: Finding the Use of Closed Circuit Television to be “Necessary” Under *Maryland v. Craig*

It is well-settled that requiring a child-victim to testify in the presence of the accused can be traumatic for some child-victims.<sup>1</sup> As a child-victim’s attorney, you can help shield child-victims from this confrontational trauma<sup>2</sup> by securing alternate means of testimony.<sup>3</sup> This *Bulletin* discusses the standard articulated by the Supreme Court in *Maryland v. Craig* for allowing alternate methods of testifying and provides an overview of a variety of jurisdictions’ laws so that you may be better positioned to seek protection for child-victims.<sup>4</sup>

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### I. The Supreme Court’s Articulation of the Necessity Standard

The Confrontation Clause of the Sixth Amendment, which applies to the states through the Fourteenth Amendment,<sup>5</sup> provides criminal defendants with the “right . . . to be confronted with the witnesses against him.”<sup>6</sup> This right to confrontation is not absolute, however. “[T]he Confrontation Clause reflects a preference for face-to-face confrontation at trial, a preference that must occasionally give way to considerations of public policy and the necessities of the case.”<sup>7</sup>

In *Craig*, the Court found that a Maryland statute that permitted child-victims to testify by one-way closed circuit television (CCTV)<sup>8</sup> outside the presence of the defendant was constitutionally permissible if the denial of defendant’s ability to confront accusatory witnesses face-to-face is “necessary to further an important public policy,” and so long as “the reliability of the testimony is otherwise assured.”<sup>9</sup>

Finding that the state has an important interest in “protecting child witnesses from the trauma of testifying in child abuse cases,” the inquiry was whether it was “necessary” for a child-victim to testify outside the presence of the defendant.<sup>10</sup> The requisite finding of necessity is case-specific: “The trial court must hear evidence and determine whether use of the [CCTV] procedure is necessary to protect the welfare of the particular child witness who seeks to testify.”<sup>11</sup> Additionally, the finding must show that the child-victim would be traumatized not by testifying in the courtroom generally, but by the presence of the defendant specifically, and that the emotional distress suffered by the child-victim is more than de minimis—in other words, more than “mere nervousness or excitement or some reluctance to testify.”<sup>12</sup>

In articulating the test, the Court did not establish “as a matter of federal constitutional law . . . categorical evidentiary prerequisites for the use of the one-way television procedure.”<sup>13</sup> Accordingly, state and federal courts have attempted to determine what “evidentiary prerequisites” are required in interpreting their respective laws. This *Bulletin* highlights federal<sup>14</sup> and state courts’<sup>15</sup> determinations of what evidentiary prerequisites are required to justify the testimony of a child-victim using CCTV. The selected decisions provide a starting point for analyzing testimonial accommodations for child-victims.<sup>16</sup>

## II. Demonstrating that Testimony via CCTV is “Necessary” under *Craig*

### A. Upon whom may a court rely in making a finding of necessity?

Most jurisdictions have determined that, unless the statute explicitly mandates expert testimony, a qualified expert is *not* required for the court to make a finding of necessity under *Craig*.<sup>17</sup>

Courts can rely on an array of witnesses in making a finding of necessity. Social workers provide one common source of testimony. Courts generally find reliance on the testimony of social workers to be sufficient, provided their testimony otherwise meets the requirements of *Craig*.<sup>18</sup> Courts will also sometimes rely on the testimony of a child-victim’s parents in determining whether the child-victim would be traumatized by testifying in the presence of the defendant.<sup>19</sup> Finally, courts will rely on their own judicial observations in determining whether a child-victim is unable to testify in front of the defendant.<sup>20</sup> Often, when a judge relies on judicial observations, the victim will have begun testifying in front of the defendant before becoming too upset to continue.<sup>21</sup>

### B. Must the child-victim be questioned directly about the potential for trauma?

It is clear from the Supreme Court’s opinion in *Craig* that the child-victim is not required to appear in the presence of the defendant before a finding of necessity is established.<sup>22</sup> Indeed, the purpose of statutes providing for the use of CCTV is to avoid the trauma of a child-victim testifying in front of the defendant;

this purpose would be thwarted if the child-victim were required to testify in front of the defendant before an accommodation could be granted.<sup>23</sup>

While no court has found the child-victim’s testimony to be required, at least one trial court has found that a defendant’s rights were violated when the court failed to ask the child-victim whether she would be able to testify in front of the defendant before allowing testimony by CCTV.<sup>24</sup> On appeal, the South Carolina Supreme Court “decline[d] to adopt an absolute requirement” that a child-victim be questioned, while noting that it is the “better practice” for a trial court judge to do so when possible.<sup>25</sup> Most other courts to consider the issue have found that a child-victim need not be questioned at all in order to justify a finding of necessity.<sup>26, 27</sup>

## III. Conclusion

Courts are generally relatively flexible when considering the types of evidence that will support a *Craig* finding. For instance, a court can rely on a victim’s parent or on the court’s own observations in determining that a child-victim is unable to testify. The inquiry does not appear to turn on the identity of the person providing the evidence; rather, the key is that whoever testifies must satisfy the prongs of *Craig*—that is, the findings are case-specific, the trauma would not result from the courtroom generally but from testifying in front of the defendant specifically, and the emotional distress caused by the defendant would be more than de minimis.

### Practice Pointer

Each child-victim is unique. It is impossible to generalize about the risk of trauma from testifying in the presence of a defendant. You should work closely with your client to evaluate whether and what accommodations may help protect the child-victim and avoid or reduce trauma.

NCVLI thanks Ashley Nastoff (Lewis & Clark Law School, 2011) for her research and assistance in the preparation of this *Bulletin*.

<sup>1</sup> See, e.g., *Maryland v. Craig*, 497 U.S. 836, 853 (1990) (discussing the state's interest in protecting the welfare of children and noting the "growing body of academic literature [that] document[s] the psychological trauma suffered by child abuse victims who must testify in court"); Dorothy F. Marsil et al., *Children as Victims and Witnesses in the Criminal Trial Process: Child Witness Policy: Law Interfacing with Social Science*, 65 Law & Contemp. Prob. 209, 213 (2002) (noting that "the phenomenon of confrontational stress experienced by children is amply supported by social science evidence" and citing sources).

<sup>2</sup> Throughout this *Bulletin*, the term "trauma" is used to describe emotional risk or disturbance; it is not used in a clinical sense.

<sup>3</sup> Studies from a cross-section of victim populations consistently find that choice of how, when, and the extent of participation in justice system processes is important to victims and is a means for them to gain a sense of control, healing, and psychological and emotional well-being. See, e.g., Lauren Bennett Cattaneo and Lisa A. Goodman, *Through the Lens of Therapeutic Jurisprudence: The Relationship Between Empowerment in the Court System and Well-Being for Intimate Partner Violence Victims*, 25 J. Interpersonal Violence 481, 483-85 (2010); Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y. U. L. Rev. 911, 953-55 (2006). Testifying in a criminal proceeding can have either an empowering or a traumatizing effect on a child-victim. See, e.g., Tanya Asim Cooper, *Sacrificing the Child to Convict the Defendant: Secondary Traumatization of Child Witnesses by Prosecutors, Their Inherent Conflict of Interest, and the Need for Child Witness Counsel*, 9 Cardozo Pub. L. Pol'y & Ethics J. 239, 248-253 (Spring 2011); Jessica Liebergott Hamblen, *The Legal Implications and Emotional Consequences of Sexually Abused Children Testifying as Victim-Witnesses*, 21 Law & Psychol. Rev. 139 (1997); Myrna S. Raeder, *Enhancing the Legal Profession's Response to Victims of Child Abuse*, 24 Crim. Just. 12, 14 (Spring 2009).

<sup>4</sup> It is important to consult your jurisdiction's specific language when seeking accommodations.

<sup>5</sup> *Craig*, 497 U.S. at 844.

<sup>6</sup> U.S. Const. amend. VI.

<sup>7</sup> *Craig*, 497 U.S. at 849 (citations omitted).

<sup>8</sup> The *Craig* decision considered one-way CCTV, a method by which the people in the courtroom can see the witness, but the witness cannot see the people in the courtroom (including the defendant). Another method not analyzed in *Craig* is two-way CCTV. Under a two-way system, those in the courtroom can see the witness, and the witness can see those in the courtroom. For the most part, courts do not distinguish between one-way and two-way CCTV in applying *Craig*. Compare *United States v. Bordeaux*, 400 F.3d 548, 554-55 (8th Cir. 2005) (rejecting the state's position that *Craig* does not apply to two-way CCTV), *United States v. Garcia*, 7 F.3d 885, 888 (9th Cir. 1993) (applying the *Craig* analysis to testimony via two-way CCTV), and *United States v. Carrier*, 9 F.3d 867, 870-71 (10th Cir. 1993) (same), with *United States v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999) (holding that it is unnecessary to apply the *Craig* analysis when two-way CCTV is used).

<sup>9</sup> *Craig*, 497 U.S. at 850.

<sup>10</sup> *Id.* at 855.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 856-57.

<sup>13</sup> *Id.* at 860.

<sup>14</sup> The Child Victims' and Child Witnesses' Rights Act, 18 U.S.C. § 3509(b), which was passed in the months following *Craig*, provides several alternatives to live, in-court testimony, including testimony by two-way CCTV.

<sup>15</sup> Forty-six states explicitly provide for the use of CCTV or other alternate means of testimony for child-victims. Margaret Brancatelli, *Facilitating Children's Testimony: Closed Circuit Television*, Update, National Center for Prosecution of Child Abuse vol. 21, No. 11 (2009), available at [http://www.ndaa.org/pdf/update\\_vol\\_21\\_no\\_11.pdf](http://www.ndaa.org/pdf/update_vol_21_no_11.pdf). Even if a jurisdiction does not have a specific statutory provision allowing for the use of CCTV or other accommodations, it may nevertheless be possible to protect a child-victim using alternative means of testimony. See *Hicks-Bey v. United States*, 649 A.2d 569 (D.C. Ct. App. 1994) (finding the use of CCTV to be constitutional, despite there being no enabling legislation, as long as the *Craig* factors are met).

<sup>16</sup> Although this *Bulletin* focuses on the use of CCTV, this should not foreclose your consideration of other accommodations available either by statute or under your jurisdiction's victims' rights statutes (such as the right to protection). Other types of accommodation may include the use of screens, testifying in a less intimidating environment, the presence of support persons or therapy animals, or the use of comfort items.

<sup>17</sup> See, e.g., *Hicks-Bey*, 649 A.2d at 575 (finding, without discussion, that the procedure used, whereby no expert testified but instead the child-victim was permitted to testify via CCTV based on the observations of the judge, was proper); *People v. Paramore*, 288 A.D.2d 53, 53 (N.Y. App. Div. 2001) (finding the trial court properly permitted the child-victim to testify via CCTV based on its own observations and the testimony of two witnesses).

<sup>18</sup> See, e.g., *People v. Powell*, 194 Cal. App. 4th 1268, 1284 (Cal. Ct. App. 2011) (finding no abuse of discretion in allowing the child-victim to proceed by CCTV when social worker who had worked directly with the child-victim testified that the child-victim would suffer great emotional distress if forced to testify in front of defendant); *People v. Rodriguez*, 209 P.3d 1151, 1157 (Colo. Ct. App. 2009) (finding sufficient support on the record for trial court's decision when social worker who provided therapy to the child-victim testified that the child-victim would be traumatized). It is important to carefully consider your jurisdiction's privilege laws before using a social worker or another individual who might rely on privileged information to make a *Craig* showing. In some instances, it may be the best practice to make the *Craig* showing using a different witness.

<sup>19</sup> See, e.g., *People v. Powell*, 194 Cal. App. 4th 1268, 1284 (Cal. Ct. App. 2011) (finding no abuse of discretion in allowing the child-victim to proceed by CCTV based in part on testimony of her mother: "The mother's opinion, even if based on instinct, buttressed the social worker's view in that she knew her daughter best"); *State v. Crandall*, 577 A.2d 483, 486 (N.J. 1990) (employing use of CCTV after finding the child-victim would be traumatized by the presence of the defendant based on testimony by the child-victim and her mother). This testimony is best supplemented by other testimony, and must otherwise meet the *Craig* factors. See, e.g., *State v. Folk*, 256 P.3d 735, 746 (Idaho 2011) (finding a violation

where a child-victim was permitted to testify via CCTV based solely on the testimony of her mother, who stated that the child-victim once had a nightmare about the defendant).

<sup>20</sup> See, e.g., *Rouse*, 111 F.3d at 568-69 (stating that a "because of fear" finding "may be based upon the court's own observation and questioning of a severely frightened child"); *United States v. Longstreath*, 42 M.J. 806, 816 (U.S. Navy-Marine Corps. Ct. of Crim. App. 1995) ("Congress did not intend to prevent the federal courts from acting when a child witness is demonstrably suffering trauma on the stand.").

<sup>21</sup> *Id.*

<sup>22</sup> *Craig*, 497 U.S. at 859-60 ("The Court of Appeals appears to have rested its conclusion at least in part on the trial court's failure to observe the children's behavior in the defendant's presence . . . . Although we think such evidentiary requirements could strengthen the grounds for use of protective measures, we decline to establish, as a matter of constitutional law, any such categorical evidentiary prerequisites to the use of the one-way television procedure.").

<sup>23</sup> See, e.g., *id.* at 853 (noting the important and widespread public policy of protecting the physical and psychological well-being of child-victims from the trauma of testifying in the presence of the defendant). For this reason too, a victim may wish to assert the right to protection under the appropriate jurisdiction's victim's rights laws as a basis for allowing the child-victim to testify by CCTV.

<sup>24</sup> *State v. Bray*, 517 S.E.2d 714, 719 (S.C. Ct. App. 1999).

<sup>25</sup> *State v. Bray*, 535 S.E.2d 636, 641 (S.C. 2000).

<sup>26</sup> See, e.g., *United States v. McCollum*, 58 M.J. 323, 332 (C.A.A.F. 2003) ("The Sixth Amendment does not require a military judge, as a matter of course, to interview or observe a child witness prior to allowing the child to testify outside of an accused's presence."); *Powell*, 194 Cal. App. 4th at 1283 (finding that although the state statute permitted the court to question the child-victim to obtain her views, this procedure was not required).

<sup>27</sup> Note also that if a court is to question a child-victim directly about the impact of testifying, a defendant's Confrontation Clause rights do not necessitate his or her presence at a pretrial *Craig* hearing. Although

the Supreme Court has not addressed this question specifically, case law establishes that confrontation clause rights do not apply to pretrial hearings. *See, e.g., Kentucky v. Stincer*, 482 U.S. 730 (1987) (defendant's confrontation right was not violated when he was excluded from pretrial competency proceedings regarding two child-victims because defendant was afforded the opportunity for full and effective cross-examination of the child-victims at trial); *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) ("The opinions of this court show that the right to confrontation is a trial right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination."); *Peterson v. California*, 604 F.3d 1166, 1169-70 (9th Cir. 2010) (the Sixth Amendment does not provide a right to confrontation at a preliminary hearing conducted before trial).

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