

## 29.8 Remote Testimony

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## 29.8 Remote Testimony

“Remote testimony” refers to testimony given by a witness outside of the defendant’s physical presence by way of a “live,” closed-circuit television system. The system can be either “one-way” where the witness is not in the defendant’s presence and cannot see the defendant but the defendant can see the witness, or “two-way” where the witness is not in the defendant’s presence but the witness and defendant can see each other over video monitors.

The use of closed-circuit television systems is most often sought in cases involving child witnesses where the State asserts that the child would be traumatized if required to testify in the defendant’s presence. If the State’s motion to allow remote testimony is granted, the child is generally in a separate room and testifies by way of a one-way, closed-circuit television. The child cannot see the defendant during the testimony, but the defendant and the trier of fact can see the child and his or her demeanor while testifying.

### A. Constitutional Implications

**Exception for one-way, remote testimony for child witness.** Although the defendant has the right to confront witnesses against him or her under the Sixth Amendment to the U.S. Constitution and under article I, section 23 of the N.C. Constitution, the right to confront a witness “face-to-face” may not be absolute when child witnesses are involved. In *Maryland v. Craig*, 497 U.S. 836 (1990), the U.S. Supreme Court found no Sixth Amendment violation where a child victim in a sexual abuse case was permitted, pursuant to a Maryland statute, to testify outside the defendant’s presence via one-way, closed-circuit television. The statute allowed the witness, the prosecutor, and the defense attorney to withdraw to a separate room while the witness testified. The defendant, the judge, and the jury remained in the courtroom and watched the witness’s testimony on a video monitor. The defendant could communicate electronically with his attorney, but the witness could not see the defendant.

The U.S. Supreme Court reviewed the arrangement used in *Craig* and found that a defendant’s right to confrontation “may be satisfied absent a physical, face-to-face confrontation at trial” if the denial of confrontation “is necessary to further an important

public policy” and “the reliability of the testimony is otherwise assured.” *Id.* at 850. The finding of necessity must be made on a case-by-case basis. *Id.* at 855. A majority of the Court found that the State could show that the use of the special procedure was necessary to further its interest in protecting the physical and psychological well-being of child abuse victims and that it could be sufficient to outweigh a defendant’s right to face his or her accusers in court.

The Court stated that before this type of arrangement is allowed, the trial judge must:

- hold a hearing and take evidence to determine whether the use of the procedure is necessary to protect the welfare of the particular child witness;
- find that the child witness would be traumatized, not just by the courtroom generally, but by the defendant’s presence; and
- find that the emotional distress suffered by the child witness in the defendant’s presence is “more than *de minimis*; *i.e.*, more than ‘mere nervousness or excitement or some reluctance to testify.’”

*Id.* at 855–56 (citation omitted). The majority held that the trial judge may rely solely on expert testimony in making his or her findings. The child need not attempt to testify in the defendant’s presence to prove that he or she would be traumatized by doing so. *Id.* at 859–60.

The Court reasoned that even though there was no “face-to-face” confrontation, the reliability of the child witness’s testimony was “otherwise assured” because the Maryland statute required the child to be competent as a witness and testify under oath, the defendant had the opportunity for contemporaneous cross-examination, and the defendant, judge, and jury all were able to view the demeanor and body of the child witness while he or she testified (albeit through the video monitor). *Id.* at 850–51; *see also In re Stradford*, 119 N.C. App. 654 (1995) (upholding the trial judge’s authority to permit the remote testimony of a child witness on the facts of sexual abuse case and finding no state or federal constitutional violation).

Since the decision in *Craig*, “[t]he federal government and nearly all states have enacted statutes providing for alternatives to face-to-face confrontation when necessary to shield child witnesses or other sensitive witnesses.” Hadley Perry, Note & Comment, *Virtually Face-to-Face: The Confrontation Clause and the Use of Two-Way Video Testimony*, 13 ROGER WILLIAMS U. L. REV. 565, 580 (2008). North Carolina statutes on remote testimony are discussed in subsections B. and C., below.

Questions remain, however, whether remote testimony by children or other witnesses satisfies the U.S. Supreme Court’s revived approach to the Confrontation Clause in *Crawford v. Washington*, 541 U.S. 36 (2004). Although a majority of the Court in *Craig* approved remote testimony in that case, Justice Scalia dissented in typically strong language, arguing that the Confrontation Clause gives the defendant the right to cross-examine, face-to-face, witnesses against him or her and that remote testimony is not permissible under his reading of the Confrontation Clause. Justice Scalia later authored the

*Crawford* decision, in which he led a majority of the Court in ruling that the Confrontation Clause restricts the introduction of out-of-court statements and in overruling the looser balancing test used in previous decisions. Cases challenging remote testimony have worked their way through the appellate courts, but as yet neither the U.S. Supreme Court nor the N.C. Supreme Court have addressed the issue. See Jessica Smith, [Two-Way Remote Testimony: Will It Pass Muster? \(Parts I, II, & III\)](#), N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Feb. 8–10, 2011); see also *In re Court Rules*, 207 F.R.D. 89 (2002) (statement by Justice Scalia) (discussing proposed changes to Federal Rules of Criminal Procedure on remote testimony).

The N.C. Court of Appeals has addressed the permissibility of a child testifying remotely in light of *Crawford* in *State v. Jackson*, 216 N.C. App. 238 (2011). The court held that *Crawford* did not overrule earlier decisions holding that a child may testify remotely in a criminal case when the court finds a sufficient showing of need and uses appropriate procedures for taking the child's testimony. *Id.* at 243 (collecting post-*Crawford* cases from other jurisdictions that continue to uphold *Craig*); see also *State v. Lanford*, 225 N.C. App. 189 (2013) (following *Jackson*). For a further discussion of *Jackson*, see Jessica Smith, [N.C. App. Holds that Maryland v. Craig Survives Crawford](#), N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Oct. 13, 2011).

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**Practice note:** If the judge excludes the defendant from the courtroom during a witness's testimony and orders that he or she be allowed to monitor the proceedings by closed-circuit television, counsel can request an instruction in accordance with N.C. Pattern Jury Instruction—Crim. 101.32 (June 2007), which directs that the jury be instructed regarding the defendant's absence and that the defendant's absence should not be considered with regard to his or her guilt or innocence. If no instruction is requested, the failure of the judge to instruct on this subordinate feature of the case will not be held to be error. See generally *State v. Turner*, 11 N.C. App. 670 (1971).

If the witness is allowed to testify in a separate room from the defendant and the trier of fact, counsel should consider whether it would be helpful for the jury to be instructed that the witness's absence from the courtroom should not create any presumption against the defendant or influence its decision in any way. The pattern jury instructions do not contain an instruction on this issue. If an instruction on the witness's absence is desired, counsel should draft one that fits the facts of the case and request that it be submitted to the jury.

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**Exceptions for adult witnesses.** The U.S. Supreme Court has not determined whether, or under what circumstances, the Confrontation Clause would permit the use of one-way or two-way remote video testimony by adult witnesses. However, after *Crawford v. Washington*, 541 U.S. 36 (2004), courts in other jurisdictions and the N.C. Court of Appeals have extended the reasoning of *Maryland v. Craig*, 497 U.S. 836 (1990), to allow the use of remote testimony for adult witnesses in certain instances. See *State v. Seelig*, 226 N.C. App. 147 (2013) (collecting cases from other jurisdictions after *Crawford* that have applied the *Craig* test in deciding whether a defendant's constitutional right to confront was violated when an adult witness testified via live, two-way video transmission at trial); see also Jessica Smith, [N.C. Court of Appeals OKs Remote Two-Way Testimony for Ill Witnesses](#),

N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (April 10, 2013) (discussing *Seelig* and listing some policy reasons that other jurisdictions have found to satisfy the Confrontation Clause when deciding whether to permit remote testimony by adults).

In *Seelig*, a State's witness was permitted to testify via live, two-way, closed-circuit internet broadcast from Nebraska after he suffered a severe panic attack and was hospitalized on the day he was scheduled to fly to North Carolina for trial. In reviewing the defendant's Sixth Amendment challenge, the court adopted the two-part *Craig* test as "the controlling test to determine the admissibility of witness testimony absent face-to-face confrontation at trial." *Seelig*, 226 N.C. App. 147, 156 (noting the court's previous holding in *State v. Jackson*, 216 N.C. App. 238 (2011), that *Crawford* "did not address the face-to-face aspect of confrontation and did not overrule *Craig*"). Applying the *Craig* test, the court found no error in the admission of the remote testimony because (1) it was necessary to further the State's important "interest in justly and efficiently resolving a criminal matter when a witness cannot travel because of his health"; and (2) the reliability of the testimony was assured because the deputy clerk administered the oath to the witness via the two-way video feed, the trial judge cautioned the witness that he would be subject to perjury charges if he answered falsely, the defendant had the opportunity to cross-examine the witness, and the defendant and the jury could view the witness while he testified. *Id.*, 226 N.C. App. at 158–59.

It remains to be seen whether the U.S. Supreme Court will sanction the extension of *Craig* and allow the use of remote testimony for adult witnesses in certain circumstances. See *Wrotten v. New York*, 560 U.S. 959, 960 (2010) (denying certiorari in an interlocutory case where the prosecuting witness was allowed to testify via two-way video due to his age and poor health; Justice Sotomayor noted in a statement filed with the denial that "[b]ecause the use of video testimony in this case arose in a strikingly different context than in *Craig*, it is not clear that the latter is controlling").

## **B. Statutory Authority for Remote Testimony of Child Witnesses**

**In general.** G.S. 15A-1225.1, authorizes a trial judge to permit the remote testimony of a competent minor who is under the age of sixteen at the time of his or her testimony if certain procedures are followed. The statute applies to criminal and juvenile delinquency proceedings. G.S. 15A-1225.1(a)(2). The statutory requirements are similar to those delineated by the U.S. Supreme Court in *Craig*, but in some respects the statute may exceed the constitutional limits described in *Craig*—for example, remote testimony is statutorily permissible in any criminal or juvenile delinquency case (assuming the various requirements are met), not just in a case involving particularly serious or sensitive allegations like the sexual abuse charges in *Craig*. G.S. 15A-1225.1 survived a general challenge under the Confrontation Clause analysis of *Crawford v. Washington* in *State v. Jackson*, 216 N.C. App. 238 (2011), discussed in subsection A, above. See also *State v. Lanford*, 225 N.C. App. 189 (2013) (finding that defendant's confrontation rights under the Sixth Amendment and the N.C. Constitution were not violated when the trial judge allowed the child witness to testify outside defendant's presence via one-way, closed-circuit television).

For a further discussion of the statute, including ambiguities in the statute's provisions and potential constitutional issues, see John Rubin, [2009 Legislation Affecting Criminal Law and Procedure](#), ADMINISTRATION OF JUSTICE BULLETIN No. 2009/09, at 23–26 (UNC School of Government, Dec. 2009).

**Statutory procedures.** Remote testimony of a child is authorized if the child would suffer serious emotional stress by testifying in the defendant's presence, and the child's ability to communicate with the trier of fact would be impaired. G.S. 15A-1225.1(b). The court, on its own motion or on motion of a party, must hold an evidentiary hearing to determine whether to allow the remote testimony. G.S. 15A-1225.1(c). The child need not be present at the hearing. *Id.*

After the hearing, the judge must enter an order setting out the ruling and stating the findings of fact and conclusions of law that support the determination. G.S. 15A-1225.1(d). If remote testimony is allowed, the order must:

1. state the method by which the witness is to testify;
2. list any individual or category of individuals allowed to be in or required to be excluded from the presence of the witness during testimony;
3. state any special conditions necessary to facilitate the cross-examination of the witness;
4. state any condition or limitation on the participation of individuals in the presence of the witness during the testimony; and
5. state any other conditions necessary for taking or presenting testimony.

*Id.* The statute also sets out the method to be used in cases where remote testimony is allowed. *See* G.S. 15A-1225.1(e).

Although the statute sets out detailed procedures that must be followed when remote testimony is requested, the failure to follow the statutory mandates is not necessarily reversible error. *See State v. Phachoumphone*, \_\_\_ N.C. App. \_\_\_, 810 S.E.2d 748 (2018) (finding multiple violations of the express requirements of G.S. 15A-1225.1 but holding that defendant failed to show how he was prejudiced by the particular procedure employed by the trial judge).

### **C. Statutory Authority for Remote Testimony of Intellectually or Developmentally Disabled Witnesses**

Under G.S. 15A-1225.2, a trial judge may permit the remote testimony of a competent intellectually or developmentally disabled witness (regardless of the witness's age) in a criminal or juvenile delinquency case if the judge finds by clear and convincing evidence that the witness would suffer serious emotional distress from testifying in the defendant's presence and that the ability of the witness to communicate with the trier of fact would be impaired by testifying in the defendant's presence. The hearing procedure, requirements for an order allowing the use of remote testimony, and authorized method of testimony are

similar to those set out in G.S. 15A-1225.1 for child witnesses, discussed in subsection B., above, but there are differences.

This statute extends the category of witnesses permitted to give remote testimony beyond that authorized by *Craig*. To comply with the constitutional requirements of *Craig*, the State may need to show that the protection of this specific class of witnesses is necessary to further an important public policy; that the particular witness in question needs special protection; and that the methodology used does not offend the defendant's right to confront the witnesses against him or her. The statute also would have to survive a general challenge under the Confrontation Clause analysis of *Crawford v. Washington*, discussed in subsection A., above. G.S. 15A-1225.1, discussed in subsection B., above, survived a general challenge under the Confrontation Clause analysis of *Crawford v. Washington* in *State v. Jackson*, 216 N.C. App. 238 (2011), but no case applying G.S. 15A-1225.2 has made its way through the North Carolina appellate courts.

For a further discussion of the statute, including ambiguities in the statute's provisions and potential constitutional issues, see John Rubin, [2009 Legislation Affecting Criminal Law and Procedure](#), ADMINISTRATION OF JUSTICE BULLETIN No. 2009/09, at 26 (UNC School of Government, Dec. 2009).

#### **D. Statutory Authority for Remote Testimony of Forensic Analysts**

Under G.S. 15A-1225.3, effective September 1, 2014, a trial judge may permit the remote testimony of an analyst regarding the results of forensic testing admissible pursuant to G.S. 8-58.20 and reported by that analyst in a criminal or juvenile delinquency case if all of the following occur:

1. The State has provided a copy of the report to the attorney of record for the defendant, or to the defendant if that person has no attorney, as required by G.S. 8-58.20(d). For purposes of this subdivision, "report" means the full laboratory report package provided to the district attorney.
2. The State notifies the attorney of record for the defendant, or the defendant if that person has no attorney, at least 15 business days before the proceeding at which the evidence would be used of its intention to introduce the testimony regarding the results of forensic testing into evidence using remote testimony.
3. The defendant's attorney of record, or the defendant if that person has no attorney, fails to file a written objection with the court, with a copy to the State, at least five business days before the proceeding at which the testimony will be presented that the defendant objects to the introduction of the remote testimony.

G.S. 15A-1225.3(b). If the defendant's attorney, or a pro se defendant, fails to file a written objection as provided above, then the objection is deemed waived and the analyst shall be allowed to testify by remote testimony. *Id.*

The statute also sets out the method to be used in cases where remote testimony is allowed. *See* G.S. 15A-1225.3(c).

### **E. Additional Resources**

For further discussion of remote witness testimony, see Jessica Smith, [\*Remote Testimony and Related Procedures Impacting a Criminal Defendant's Confrontation Rights\*](#), ADMINISTRATION OF JUSTICE BULLETIN No. 2013/02 (UNC School of Government, Feb. 2013); Annotation, *Closed-circuit Television Witness Examination*, 61 A.L.R.4th 1155 (1988 & Supp. 2010); Ralph H. Kohlmann, *The Presumption of Innocence: Patching the Tattered Cloak After Maryland v. Craig*, 27 ST. MARY'S L. J. 389 (1996) (discussing the importance of the right of confrontation with respect to defendant's presumption of innocence); Cathleen J. Cinella, Note, *Compromising the Sixth Amendment Right to Confrontation—United States v. Gigante*, 32 SUFFOLK U. L. REV. 135 (1998) (discussing compromise in the right of confrontation when adult witnesses are allowed to testify via closed-circuit television).