# MEMORANDUM IN SUPPORT OF MOTION TO ALLOW

##### CHILD WITNESSES TO TESTIFY BY VIDEOTAPE

##### State of Utah

The State of Utah submits the following Memorandum of Law in support of its Motion to Allow J.W. and C.W. to Testify By Videotape. The Motion is based upon the provisions of Rule 15.5(3) of the Utah Rules of Criminal Procedure, as fully set out in the Motion. The State seeks a ruling from the Court that the videotaped testimony of the children should be taken outside the presence of both defendants in this case. It is undisputed that J.W. (6) and C.W. (5) are under the age of 14.

The State proffers that the children’s therapist, D.S., LCSW at \_\_\_\_\_\_ Mental Health, will testify that if forced to testify in open court in the presence of B.W. or T.W., the defendants, each child would likely suffer serious emotional or psychological harm, and that their testimony would be less reliable because of their tendency to say nothing or to dilute their testimony because of the presence of the defendants. Ms. D.S. would further testify that J.W. and C.W. have very ambivalent and conflicting feelings about the abuse they suffered at the hands of their Mother and her live-in boyfriend, T.W., and those feelings would create additional trauma to the children if they had to testify about their own abuse and the abuse of B.L. while in the presence of their abusers. These children were subjected themselves to abusive conduct on the part of both defendants while they lived together in Utah and they also witnessed at least some of the abusive conduct directed towards B.L., their half-sister, who is the victim in this case. Ms. D.S. has been seeing both J.W. and C.W. in therapy either weekly or bi-weekly since June 13, 1996, and the therapy has included individual, group, and family sessions. Ms. D.S. has witnessed incidents in which C.W. would begin to say something about her Mother, B.W., J.W. would stare at C.W., then C.W. would either stop her statement or retract it. Given this, it is Ms. D.S.’s opinion that both children would be unable to provide complete and reliable testimony in this case if they had to testify in the physical presence of T.W. and C.W. Ms. D.S. would also testify that five-year old C.W. has developed an eating disorder by which she starves herself, then eats and throws up. This behavior appears to be related to feelings about her Mother, and about what happened to B.L. Finally, Ms. D.S. would testify that neither J.W. nor C.W. have seen T.W. since the death of B.L. and both have expressed that they do not want to see him and would be afraid to see him.

 **ARGUMENT**

 **POINT 1**

 **ALLOWING J.W. AND C.W. TO TESTIFY BY VIDEOTAPE**

 **IS CONSISTENT WITH RULE 15.5 OF THE UTAH RULES OF CRIMINAL**

 **PROCEDURE AND DOES NOT COMPROMISE THE CONSTITUTIONAL**

 **RIGHTS OF THE DEFENDANTS**

The State proposes that a date be set prior to the trial of this matter for taking the testimony of J.W. and C.W. by videotape and further proposes that date be set enough in advance of trial that both sides will have access to the tape of the testimony in time to file whatever pretrial motions might be appropriate concerning the actual testimony of the children. This will allow the defendants to make whatever arguments they wish that the probative value of the testimony is substantially outweighed by the unfair prejudicial effect of the testimony after the nature of that testimony is known. In addition, knowing what the children will testify to will assist the Court in ruling on the State’s Motion to Admit Evidence of Defendant’s Prior Misconduct, since that motion is to some extent contingent on whether J.W. and C.W. are able to testify fully.

More importantly, J.W. and C.W. are critical witnesses in this case, since they are the only persons other than the defendants who survived to relate the events that occurred in the home of B.W. and T.W., which resulted in the extended torture of B.L. and ultimately resulted in B.L.’s death. Although child abuse of this nature commonly occurs in the absence of other witnesses, it now appears that J.W. and C.W. did witness at least some of the maltreatment of B.L., and were the victims themselves of other maltreatment at the hands of the defendants. Thus, the probative value of any testimony they are able to offer is extremely high.

Since the function of a trial is to seek the truth, as completely and accurately as is possible, it is in the interests of justice and the truth seeking purpose to accommodate these young children in a way that maximizes their ability to provide reliable testimony. The United States Supreme Court recently held that closed-circuit testimony of young children in child abuse prosecutions does not automatically offend the United States Constitution and that the right to confront witnesses is not absolute, but may give way when necessary to allow complete and accurate testimony of a child. In the case of *Maryland v. Craig*, 497 U.S. 836 (1990), the United States Supreme Court held that there was no absolute right on the part of a criminal defendant to a “face-to-face” confrontation as to the child witness against her and that the prosecution has a substantial interest in protecting child witnesses from the trauma of testifying in the presence of the alleged perpetrator. Craig was a preschool/kindergarten operator who was convicted of sexual abuse of a 6-year-old girl. At trial, the victim’s testimony was obtained pursuant to a Maryland statute that allowed closed circuit televising of her testimony from a separate room to the courtroom. Only the attorneys and the victim were in the separate room, the defendant, judge and jury all remained in the courtroom and watched her testimony on a monitor. The defendant had a means of two-way communication with her attorney during the questioning. The statutory standard for allowing this procedure was that the victim would suffer “serious emotional distress such that she could not reasonably communicate” if required to testify in the presence of the defendant. Expert testimony was admitted in the trial court that the victim and other children would suffer harm or be unable to communicate in the defendant’s presence.

The United States Supreme Court begins their analysis with an acknowledgment of the value of the right to confrontation, and the many cases appearing to hold that there is a right to face-to-face confrontation. However, the Court found, the right to face-to-face confrontation is not absolute, and must give way in appropriate circumstances. The Court cites several examples in which such face-to-face confrontation is dispensed with, such as admissible hearsay:

“Given our hearsay cases, the word ‘confronted’, as used in the Confrontation Clause, cannot simply mean face-to-face confrontation, for the Clause would then, contrary to our cases, prohibit the admission of any accusatory hearsay statement made by an absent declarant — a declarant who is undoubtedly as much a ‘witness against’ a defendant as one who actually testifies at trial.

In sum, our precedents establish that ‘the Confrontation Clause reflects a preference for face-to-face confrontation at trial,’ (citation omitted), a preference that ‘must occasionally give way to considerations of public policy and the necessities of the case.’ ”

497 U.S. 849. The Court then noted that although the Maryland procedure dispensed with the face-to-face confrontation, since the child could not see the defendant, it preserved every other aspect of the right to confront, including cross-examination; competency of the witness, and the jury was able to view the demeanor of the witness as she testified. The next part of the Court’s ruling is:

“We likewise conclude today that a State’s interest in 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. That a significant majority of States have enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy.” 497 U.S. 853.

The Court then held that to dispense with face-to-face confrontation, the trial court must make a case-specific finding of necessity:

“The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify . . . The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant . . . Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma . . . Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis, i.e. more than ‘mere nervousness or excitement or some reluctance to testify’.”497 U.S. at 855-856.

The summary offered by the *Craig* Court:

“[W]e conclude that where necessary to protect a child witness from trauma that would be caused by testifying in the presence of the defendant, at least where such trauma *would impair the child’s ability to communicate*, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation.” 497 U.S. 857 (emphasis added).

The State in this case proposes that an evidentiary hearing be set at the next pretrial hearing in this case, and that at the evidentiary hearing, Ms. D.S. be called as a witness to offer testimony as to the effects on J.W. and C.W. of testifying in the presence of T.W. and B.W. in an open courtroom. That would allow this Court to make the necessary “case-specific” findings as set forth in *Craig* and the Utah Rule of Criminal Procedure.

The procedure outlined in Rule 15.5 of the Utah Rules of Criminal Procedure for videotaped testimony of child witnesses in abuse cases goes even further than the Maryland statute in approximating the conditions of a trial and the protections of the Confrontation Clause. In addition to focusing attention on the psychological trauma, which would be suffered by the child witness, the Rule also focuses on the reliability of the testimony, which would be offered by the child in the presence of the defendants. In addition, the Rule adds the requirement that the trial judge inform the child that the defendants are watching her testimony on a television monitor, further approximating the face-to-face aspect of most confrontation. There is no case that holds that the Constitution provides an absolute right to a criminal defendant to “stare down” a witness against him/her. In *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798 (1988), a case in which a conviction for child sexual abuse was reversed because the child victims were separated from the defendant by a screen that prevented him from seeing them as they testified, the Supreme Court found that “the Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; the witness may studiously look elsewhere.” 487 U.S., 1019. This holding was echoed in a post-*Craig* case in California, *People v. Sharp*, 29 Cal. App. 4th 1772, 36 Cal. Rptr 2d 117 (Ca. App. First Dist, Div. 2, 1994) where the appellate court upheld a conviction despite the fact that the prosecutor, while questioning the 8-year-old victim, stood so that the victim did not have to look at the defendant. The Court held this was not a Confrontation Clause violation:

“Indeed, the situation in this case is not materially different from one in which a witness might stare at the floor, or turn her head away from the defendant while testifying . . .The mere fact that the prosecutor facilitated T.’s decision to look away from appellant does not transform this innocuous act into a violation of the confrontation clause. 29 Cal. App. 4th at 1782.

One of the first reported cases to permit the procedure later upheld in *Craig* was *State v.* *Sheppard*, 484 A.2d 1330 (N.J. Super. Ct. App. Div. 1984). The trial judge in that case articulated very well the reasons for the minimal erosion of the confrontation right in a case where her father had sexually abused a 10-year-old girl. Though decided in 1984, the extensive reasoning by the Court mirrors the later reasoning in *Craig*. The expert testimony was summarized in this passage:

“It was his opinion, however, that avoidance of an in-court appearance through the use of video equipment would improve the accuracy of her testimony. He provided reasons: An adult witness, testifying in court, surrounded by the usual court atmosphere, aware of a black-robed judge, a jury, attorneys, members of the public, uniformed attendants, a flag, and religious overtones, is more likely to testify truthfully. The opposite is true of a child, particularly when the setting involves a relative accused by her of sexual abuse. She becomes fearful, guilty, anxious, and traumatized. In most cases, she will have been exposed to both pleasant and abusive associations with the accused. As a consequence, she has ambivalent feelings. Anger against the relative is opposed by feelings of care, not only for him but also for other family members who may be harmed by the conviction. There is guilt as well as satisfaction in the prospect of sending the abuser to prison. These mixed feelings, accompanied by the fear, guilt, and anxiety, mitigate the truth, producing inaccurate testimony. The video arrangement, because it avoids courtroom stress, relieves these feelings, thereby improving the accuracy of the testimony.” 484 A.2d at 1332.

This is an excellent summary of the reasoning behind allowing closed circuit or videotaped testimony for young witnesses of family violence, and every concern is present in this case. Although *Craig* requires individual findings as to each witness, this is a good background to use in understanding individual effects. See also *Glendening v. State*, 536 So. 2d 212 (Fla. 1989), permitting videotaped testimony of a 3-1/2 year old victim because the procedure allowed all aspects of confrontation other than face-to-face confrontation.

Cases decided in both state and federal courts since *Craig* focus on whether the case-specific decision made by the trial court to dispense with face-to-face confrontation related to the child witnesses’ inability to testify or communicate because of the presence of the defendant. If the finding was made, most courts follow *Craig* in upholding the video or closed circuit testimony. *See*, e.g. *United States v. Carrier*, 9 F.3d 867 (10th Cir. 1993); *United States v. Farley*, 992 F. 2d 1122 (10th Cir. 1993) (expert testified that it was presence of the defendant which produced fear in the victim and concern that she would not be able to testify); *State v. Lewis*, 478 S.E. 2d 861 (S.C. Ct. App. 1996) (conviction reversed because court did not make case-specific finding as to each victim); *State v. Foster*, 915 P.2d 520 (Wash. Ct. App. 1996) (6-year-old victim questioned in two competency hearings, one in defendant’s presence, one by closed-circuit out of defendant’s presence, clear evidence fear was from defendant’s presence: “neither the statute nor the Sixth Amendment require the State to show that the child will suffer permanent psychic scarring if she is forced to testify in front of the defendant; rather, the State must show that she cannot reasonably communicate at trial while in the physical presence of the defendant.” 915 P.2d, 453-454 [unclear why the trial court forced her to testify in the competency hearing in front of the defendant as a “test”, that is not required by Craig and risks the very harm intended to be protected against!]); *People v. Hyland*, 538 N.W.2d 465 (Mich. Ct. App. 1995) (finding that removing defendant from courtroom permitted because standards of *Craig* were met; victim was 8 years old); *Cf*. *Leggett v. State*, 565 So. 2d 315 (Fla. 1990) (conviction reversed because trial court failed to make a particularized finding that the child victim would suffer harm from having to testify in the defendant’s presence). Utah appellate courts have not addressed the use of closed-circuit or videotaped testimony in a criminal case.

However, the Utah courts have recognized the particular difficulties facing children as witnesses in cases involving child abuse. In *State v. Loughton*, 747 P.2d 426 (Utah 1987), the Supreme Court noted that a young child might have less ability than an adult or older child to testify in a stressful courtroom situation. And, Justice Durham of the Utah Supreme Court has noted "Courts are designed by and for adults” and “the formalized courtroom atmosphere, which tends to encourage adults to testify truthfully, may intimidate the child, particularly a child already traumatized by the crime." *State v. Lenaburg*, 781 P.2d 432, (Utah 1989), (dissenting opinion). The *Lenaburg* case predates *Craig*, but contains some interesting discussion as to admissibility of a videotaped interview with a child sexual abuse victim created under subsection (1) of Rule 15.5 of the Rules of Criminal Procedure. Although the trial court in that case found the victim was legally unavailable and that the videotaped interview was sufficiently reliable to be admitted in lieu of her testimony, the Utah Supreme Court found that there were fantastic and unreliable aspects of her statement which made it unconstitutional to restrict the defendant’s right to cross-examine the victim. In contrast to the facts of *Lenaburg*, the prosecution in this case seeks only to dispense with face-to-face confrontation between the defendants and J.W. and C.W.; no suggestion is made that the children are unavailable as witnesses, only that they would be unable to communicate if called to testify in the presence of the defendants because of fear of the defendants.

The transcript of the interviews conducted by the state’s counsel with J.W. and C.W. are attached to this memorandum to illustrate the change in their willingness to say anything about the abuse that was occurring in the B.W. and T.W. home as time passed following their being placed in the home of their natural father. In the interview of April 30, 1997, J.W. disclosed several details about the abuse that she and C.W. suffered, as well as abuse directed toward B.L. by both defendants. At the end of the interview, she said that she could answer questions about this if she were in a room with just the attorneys and the judge. On that same date, C.W. said that she didn’t think she could tell a judge about these things because it would be “too scary”. She said it would still be too scary if the judge didn’t wear robes and everyone just sat around a table and talked. C.W. did say she didn’t mind if we told the judge what she had told us. Though these questions did not focus J.W. and C.W.’s attention on the prospect of testifying in the same place as T.W. and B.W., D.S.’s discussions with them have.

 **POINT 2**

 **REVIEWING THE VIDEOTAPED TESTIMONY OF J.W. AND C.W.**

 **WILL ALLOW THIS COURT TO CONSIDER WHETHER THE PROBATIVE**

 **VALUE OF THE TESTIMONY IS SUBSTANTIALLY OUTWEIGHED BY**

 **THE DANGER OF UNFAIR PREJUDICE TO THE DEFENDANTS**

Defendant B.W. filed a Motion to Exclude Evidence, which was later withdrawn, alleging that allowing J.W. and C.W. to testify would violate the provisions of Rule 403 of the Utah Rules of Evidence. That rule provides that even if evidence is found to be relevant, it may be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice”. Obviously, it would be difficult, if not impossible, for this Court to consider the balancing test of Rule 403 prior to the testimony of J.W. and C.W. The State submits that allowing the videotaped testimony procedure prior to trial will offer counsel and the Court an opportunity to consider whether the testimony’s probative value is substantially outweighed by the risk of unfair prejudice to the defendants. Mr. G.’s original Motion seemed to suggest that there should be a blanket rule outlawing testimony from young children, because it is too emotional. That position is, for good reason, without any legal or other authority.

Mr. G. also seemed to suggest that there should be a pretrial competency determination as to J.W. and C.W., but Rule 601 of the Utah Rules of Evidence has clearly done away with the prior procedure of requiring that a child under the age of 10 years be determined to be a competent witness in a pretrial competency hearing. That Rule presumes that everyone is a competent witness and only if the opponent of the evidence can establish a deficiency in the basic aspects of competence, or can establish during testimony that Rule 403 should apply to exclude the child’s testimony should such considerations even be raised. The Utah Supreme Court recognized that Rule 601 eliminated the need for a formal pretrial competency hearing relating to child witnesses in *State v. Fulton*, 742 P.2d 1208 (Utah 1987) cert. denied 484 U.S. 1044 (1988):

“The fact that section 76-5-410 and Rule 601 abolished the

requirement that a trial court hold a competency hearing before admitting the testimony of a child under the age of 10 does not mean that the trial court may never prevent a child from testifying. Under Utah Rule of Evidence 403, a court may exclude the testimony of any witness if the testimony’s probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence . . .

We believe that Rule 403 adequately protects a defendant’s right to a fair trial and gives him or her an opportunity to raise concerns that prior to our adoption of Rule 601, might have been addressed in a competency hearing.”

FN15 . . . “The trial court may consider the child’s ability to function in the courtroom setting, i.e., to understand questions, to communicate those facts to the jury, to distinguish truth from fantasy or falsehood, etc. The court may also consider the age of the child at the time the relevant events occurred, the amount of time that has elapsed, and the degree of recollection the child demonstrates. In addition, the court may take into account the child’s susceptibility to suggestion and whether the child has been intentionally prepared or unconsciously influenced by adults in such a way that it is likely the child is only parroting what others have said about the relevant facts.” 742 P. 2d at 1218.

All these issues can be probed during the creation of the videotaped testimony of J.W. and C.W. and can be fully considered by the Court prior to admitting the taped testimony at the trial. There has been no showing by the defense that there is any reason to doubt the competency of J.W. and C.W. to be witnesses, and no showing of any authority to conduct a pretrial competency hearing, other than to the extent those issues raised in *Fulton* can be explored while creating their videotaped testimony. The *Fulton* Court also made clear that as the trial court engages in the Rule 403 balancing, the court should presume that the child’s testimony is believed by the trier of fact and should not second-guess issues relating to credibility of the child’s testimony.

As recently as September 11, 1997, the Utah Court of Appeals recognized that Rule 601 abolished the need for a pretrial qualification hearing for child abuse victims. *State v. Hall*, 946 P.2d 712 (Utah 1997).

Since J.W. and C.W. were the only eyewitnesses to the events which took place in the apartment of B.W. and T.W., which form the basis of the charges in this case, it is difficult to imagine more probative evidence than their eyewitness observations. The State will establish their basic capacity to perceive and relate factual events, as well as their ability to distinguish truth and falsity in direct examination of J.W. and C.W. The State will also question the children as to their understanding of the need to tell the truth during direct examination. Those are the basic elements of witness competency, and any other issues to be raised by the defense must be raised under Rule 403. Professor John E.B. Myers makes the following comment in Evidence in Child Abuse and Neglect Cases, 3d Edition, Wiley Law (1997):

“In balancing the probative value of a child’s testimony against the potential for unfair prejudice, the court begins by assessing the probative value of the testimony. In many cases, the child is the state’s only source of evidence on ultimate factual issues. Thus, the need for the child’s testimony is high . . . Evidence that is highly damaging to the party against whom it is offered may be ‘prejudicial’ in the lay sense of the word, but powerful evidence is not unfairly prejudicial as that concept is used in Rule 403. Evidence is ‘unfairly prejudicial’ when the evidence tempts the jury to decide the case on an improper basis such as hatred for the defendant or sympathy for the child.” Vol. 1, § 3.4, pp. 211-212.

 **CONCLUSION**

The State’s interest in protecting J.W. and C.W. from further trauma, and the interest of all parties in maximizing the opportunity to obtain the full and complete truth in this case justify the State’s request to have these young children testify on videotape outside the presence of the defendants. Further, the Court should find that J.W. and C.W. would suffer emotional or mental strain if forced to testify in the presence of T.W. and B.W. and that such a procedure would impair the reliability and completeness of their testimony. The videotape testimony alternative replicates all the required and important aspects of Constitutionally protected confrontation, with the sole exception of the “face-to-face” confrontation which the United States Supreme Court has held is not required when there is a case-specific finding that requiring face-to-face confrontation would compromise a child’s ability to testify completely and reliably or would cause the child additional trauma.

The trappings and processes of criminal courts were designed to impress upon adult witnesses the importance and solemnity of the proceeding, but criminal court processes as such are unfair to extremely young child witnesses like J.W. and C.W. Allowing them to testify via videotape outside the presence of the defendants, while allowing counsel for defendants a complete opportunity to cross-examine them simultaneously having communication with the defendants; the fact that the defendants will be able to observe the children from another room on a video monitor; the fact that the children will be told the defendants are watching from another location; and the fact that the children’s testimony must be accepted by the Court as competent prior to allowing admission of the videotape at trial closely approximates the conditions of an in-court confrontation. There is no authority that conveys upon the defendants the right to stare down child witnesses in court. Other than that accommodation, there is no difference between the procedure proposed by the State of Utah and in-court testimony.

There is no need for a pretrial competency hearing to determine the qualifications of J.W. and C.W. to act as witnesses. Under the law, they are presumed to be competent witnesses and the Court should only exclude their testimony if its probative value is substantially outweighed by the danger of unfair prejudice to the defendants. That determination can be better made after the videotaped testimony of the children is created.

The State proposes that if Judge B. will not be the trial judge in this case, this particular Motion should be heard and decided by Judge S., since the rulings made now, the actual taking of the children’s testimony on videotape, and rulings that may be requested following that testimony and at trial should all be made by the judge who will preside over the trial of this matter. Thus, courtesy copies of this Motion and Memorandum are being sent to Judge S. as well as Judge B.

RESPECTFULLY SUBMITTED THIS \_\_\_\_ DAY OF \_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_.

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Assistant Attorney General