

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BRYAN PROTHO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for a Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit**

PETITION FOR WRIT OF CERTIORARI

MICHAEL I. LEONARD
Counsel of Record
Leonard Trial Lawyers
120 N. LaSalle Street, 20th Floor
Chicago, IL 60602
(312) 380-6559
mleonard@leonardtriallawyers.com
Counsel for Petitioner

QUESTION PRESENTED

Whether 18 U.S.C. § 3509 requires a district court to question a child victim on the record before introducing the child victim's testimony at trial via two-way closed-circuit television in the courtroom, or if that statute is merely suggestive of locations of locations for such questioning of a child victim, in the event a district court elects to question the child victim.

PARTIES TO THE PROCEEDING

Petitioner is Bryan Protho, who was the Defendant-Appellant in the proceedings below.

The United States of America is the respondent and was Plaintiff-Appellee in the court of appeals.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
APPENDIX.....	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION.....	1
STATUTORY PROVISION INVOLVED	1
STATEMENT OF THE CASE.....	2
REASON FOR GRANTING THE PETITION	4
CONCLUSION.....	9

APPENDIX

Seventh Circuit Decision, July 20, 2022.....	APPENDIX A
District Court Decision, March 17, 2021	APPENDIX B
District Court Decision, February 17, 2020.....	APPENDIX C

TABLE OF AUTHORITIES

	CASES	PAGE
<i>California v. Green</i> , 399 U.S. 149 (1970)	5, 6	
<i>Coy v. Iowa</i> , 487 U.S. 1012 (1988)	5, 6	
<i>Craig v. Maryland</i> , 497 U.S. 836 (1990)	4, 6, 7	
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004)	7	
<i>Pennsylvania v. Ritchie</i> , 480 U.S. 39 (1987)	5	
<i>United States v. Protho</i> , 41 F.4th 812 (7th Cir. 2022)	3	
<i>Zechariah Chafee, The Blessings of Liberty</i> 35 (1956)	6	

	STATUTES	PAGE
--	----------	------

18 U.S.C. § 3509	1
------------------------	---

PETITION FOR WRIT OF CERTIORARI

Bryan Protho petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at *United States v. Protho*, 41 F.4th 812 (7th Cir. 2022).

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered judgment on July 20, 2022. (App. A) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The question presented involves 18 U.S.C. § 3509, which provides, in pertinent part:

(b) Alternatives to Live In-Court Testimony.—

(1) Child's live testimony by 2-way closed circuit television.—

(B) The court may order that the testimony of the child be taken by closed-circuit television as provided in subparagraph (A) if the court finds that the child is unable to testify in open court in the presence of the defendant, for any of the following reasons:

(i) The child is unable to testify because of fear.

(C) The court shall support a ruling on the child's inability to testify with findings on the record. In determining whether the impact on an individual child of one or more of the factors described in subparagraph (B) is so substantial as to justify an order under subparagraph (A), the court may question the minor in chambers, or at some other comfortable place other than the courtroom, on the record

for a reasonable period of time with the child attendant, the prosecutor, the child's attorney, the guardian ad litem, and the defense counsel present.

18 U.S.C. § 3509.

STATEMENT OF THE CASE

This case affords the Court an opportunity to provide clear direction to the United States District Courts and the Circuit Courts of Appeal regarding an important issue having significant Confrontation Clause ramifications. That issue arises under 18 U.S.C. Section 3509, which allows a child victim of certain federal sex crimes to testify at trial via 2-way closed circuit television, and deprives the accused Defendant of a face-to-face courtroom confrontation if certain conditions have been first found to have been met by the District Court. Those conditions require the District Court to make findings on the record as to whether, *inter alia*, the child "will be unable to testify because of fear." In making those findings, the statute allows the District Court Judge to interview the child outside of the courtroom, including in chambers or some other less potentially intimidating environment from the standpoint of the child. Although the status does not expressly state that the District Court must interview the child as part of its fact-finding, it appears that the statute nonetheless requires such an interview. The statute's delineation of locations does not appear to suggest that the interview itself is discretionary.

This Court's intervention is necessary to resolve this issue because it has important ramifications to all District Court trial judges, as well as to the Circuit Courts of Appeals reviewing the procedures carried out by trial Judges in making

exceptions to the Confrontation Clause in allowing victim witnesses to avoid testifying live, in-person, in the courtroom at trial.

Here, Petitioner Bryan Protho was convicted by a jury in the United States District Court for the Northern District of Illinois of kidnapping in violation of the Federal Kidnapping Act. (18 U.S.C. § 1201 (a)(1) and (g) (1)). (App. A) Mr. Protho was sentenced to 38 years in prison. On direct appeal, the appellate court affirmed Mr. Protho's conviction and sentence. *United States v. Protho*, 41 F.4th 812 (7th Cir. 2022).

Prior to trial, the Government moved, pursuant to 18 U.S.C., Section 3509(b)(1)(A) ("Section 3509"), for the entry of an Order allowing the victim-witness to testify by way of close circuit/close caption television from another location within the courthouse because she would purportedly be afraid of the Defendant. (App. A, B). At trial, the child entered the courtroom to testify, but subsequently left after becoming emotional. The trial court then held a hearing, outside the presence of the jury, to inquire about the facts and circumstances underlying the child's departure from the courtroom and her ability to appear and testify in the trial courtroom. (App. A) That hearing did not include any testimony from the child.

After hearing testimony from those who observed and spoke to the child, the District Court found that an ambiguity remained as to the reasons for the child's emotional response and departure from the courtroom. (App. A, B) The District Court advised the parties that it was considering whether to interview the child prior to ruling on whether, pursuant to the Statute, the child would be allowed to testify by

way of 2-way closed circuit television, instead of appearing in the courtroom to testify at trial in front of the Defendant and the jury. (App. A)

The District Court ultimately declined to interview the child at all. Instead, the District Court entered an Order granting the Government's motion, pursuant to Section 3509, to proceed with the child's trial testimony by way of a two-way closed-circuit television transmission ("CCTV"). (App. C) In support of that Order, the District Court made findings of fact. (App. C). The District Court concluded that, "based on the evidence presented at the evidentiary hearing," and the District Court's "own observations of Minor A's actions and demeanor when she was in the courtroom with Defendant Protho . . . the Court finds that the Government has established all the requirements necessary for Minor A to testify by two-way CCTV under 18 U.S.C. § 3509(b)(1) and *Maryland v. Craig*, 497 U.S. 836 (1990)." (App. C)

On appeal, the Seventh Circuit affirmed that ruling, and affirmed Mr. Protho's conviction and sentence. (App. A) With respect to Mr. Protho's contention that Section 3509 required the District Court to interview the victim, both pursuant to the terms of the statute as well as under the facts presented, the Seventh Circuit held that Section 3509 did not require the District Court to interview the child as part of making its factual findings. (App. A).

REASONS FOR GRANTING THE PETITION

The Court should grant the writ to make clear that, in making the determination of whether a child victim will be allowed to testify at trial by remote means, the District Court is required to interview the child as part of its obligatory

fact-finding process. The language of Section 3509 that allows the District Court to conduct that interview in a location other than the courtroom does not obviate entirely the District Court's obligation to conduct the interview of the child victim. Section 3509's permissive delineation of various locations from which the District Court "may" conduct such an interview is not to be read and interpreted that the District Court "may" or "may not" conduct such an interview at all.

Indeed, the Confrontation Clause guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. Amend. VI. "[T]he Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988) (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987)). At its core, "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Coy*, 487 U.S. at 1016; see *California v. Green*, 399 U.S. 149, 157 (1970) (the "literal right to 'confront' the witness at the time of trial . . . forms the core of the values furthered by the Confrontation Clause").

In *Coy*, the Supreme Court held that the trial court's employment of a screen between the defendant and two child witnesses, constituted an "obvious . . . violation of the defendant's right to a face-to face encounter." *Id.* at 487 U.S. 1020. In reaching that holding, this Court emphasized "the profound effect upon a witness of standing in the presence of the person the witness accuses," explaining that a physically-confronted "witness 'may feel quite differently when he has to repeat his story looking

at the man whom he will harm greatly by distorting or mistaking the facts.” *Id.* at 1019–20 (quoting *Zechariah Chafee, The Blessings of Liberty* 35 (1956)). The “right to face-to-face confrontation” thus serves to “ensure the integrity of the factfinding process.” *Id.* Accordingly, this Court held that the Confrontation Clause’s “irreducible literal meaning” guarantees “a right to meet face to face all those who appear and give evidence at trial.” *Id.* at 1021 (emphasis omitted) (quoting *Green*, 399 U.S. at 175 (Harlan, J., concurring)).

Nevertheless, this Court acknowledged that “face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a 40 malevolent adult. It is a truism that constitutional protections have costs.” *Id.* at 1020. The Court “le[ft] for another day” the issue of whether there could be exceptions to the defendant’s right to face-to-face confrontation. *Id.* at 1021.

Subsequently, in *Craig v. Maryland*, 497 U.S. 836 (1990), the Court upheld a Maryland State statute that allowed a child victim to testify from a place outside the trial courtroom by way of one-way closed-circuit television. *Id.* at 497 U.S. 840– 41, 860. The *Craig* Court held that procedure could only be utilized if the trial judge first found “that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.” *Id.* at 840–41. However, the Court made it clear that “the face-to face confrontation requirement” should not “easily be dispensed with.” *Id.* at 850. Moreover, the Court held that a “case specific finding” that a particular procedure

providing for something other than face-to-face confrontation is “necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant,” if “such trauma would impair the child’s ability to communicate.” *Id.* at 857–58.

Furthermore, the Court found that the trial court would also need to find that the witness would be traumatized by the defendant’s presence in the courtroom, not from the courtroom generally.” *Id.* at 856.

The Court again addressed Confrontation Clause issues in *Crawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, the Court held that, with respect to “testimonial evidence,” a trial court cannot employ procedures that deprive a defendant of a face-to-face confrontation, except in circumstances where the witness at issue is unavailable and the defendant had a prior opportunity to cross-examine that witness.

Section 3509 is a legislatively enacted exception to the Confrontation Clause. It provides, under tightly limited circumstances, for a District Court to allow a certain type of witness deemed worthy of additional protections (i.e., a child victim) to avoid testifying at trial in open court. However, Section 3509 clearly requires the District Court to make careful and diligent inquiry into the circumstances presented before denying the Defendant and his counsel the traditional ability to have a face-to-face confrontation with the accused, in the presence of the jury.

Section 3509 affords a child witness with enhanced protections even in the District Court’s face-finding phase. To that end, Section 3509 allows the District

Court to interview the child witness in certain, less intimidating locations, including in chamber.

However, nothing in Section 3509 allows the District Court to completely forego an interview of the child victim. Section 3509's permissive language as to the location of the interview of the child witness does not obviate the necessity for the District Court to interview the child victim as part of the fact-finding process. Since there is no basis in Section 3509 for such an interpretation, both the District Court and the Seventh Circuit erred in holding that the District Court was not required, under Section 3509, to conduct an interview of the child witness in Mr. Protho's case.

As a result, Mr. Protho was denied his Sixth Amendment right to confront the child victim at trial, and in front of the jury. That error was enormously prejudicial to Mr. Protho where, as here, his conviction rested in large part upon the identification testimony of the child witness, who had provided changing and conflicting descriptions of her perpetrator prior to trial. This included a description that was inconsistent with the appearance of Mr. Protho; a description of a distinguishing feature of the offender that was inconsistent with the features of Mr. Protho; changing descriptions of the offender's clothes; and a description of a key item of the offender's clothing that was inconsistent with that worn by or recovered from Mr. Protho. In other words, the child witness's credibility, and ability to identify the offender was one of the central issues in the case. Accordingly, the jury's assessment of her credibility, and Mr. Protho's counsel's ability to confront and cross-examine her in front of the jury, were likewise central to this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,



MICHAEL I. LEONARD

Counsel of Record

LEONARD TRIAL LAWYERS

120 N. LaSalle Street, 20th Floor

Chicago, IL 60602

(312) 380-6559

mleonard@leonardtriallawyers.com

Counsel for Petitioner

October 2022