

No. _____

IN THE
Supreme Court of the United States

CHARLES PETE EYLE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a district court violate a defendant's rights under the Due Process Clause and Confrontation Clause, and this Court's decision in *Maryland v. Craig*, 497 U.S. 836 (1990), by granting the government's motion to allow a minor victim to testify by two-way video without first holding an evidentiary hearing?

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
OPINIONS AND ORDERS BELOW.....	1
STATEMENT OF JURISDICTION	2
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THE WRIT	7
I. The Decision Below Conflicts with this Court’s Decision in <i>Maryland v. Craig</i> , Which Required that a District Court “Must Hear Evidence” Before Permitting Testimony by Video.	7
II. The Decision Below Conflicts with the Decisions of Other United States Courts of Appeals on the Same Important Matter of What Process Is Due Before a Defendant’s Confrontation Rights Can Be Infringed Upon.....	11
CONCLUSION.....	13
APPENDIX A – Court of Appeals Opinion (Sept. 18, 2017)	1A
APPENDIX B – District Court Oral Ruling (Mar. 23, 2015)	1B
APPENDIX C – District Court Order (Mar. 31, 2015)	1C
APPENDIX D – Order of Court of Appeals Denying Rehearing En Banc (Dec. 1, 2017).....	1D

TABLE OF AUTHORITIES

Federal Cases	Page(s)
<i>Butler v. Adoption Media, LLC</i> , 2005 WL 1513142 (N.D.Cal. June 21, 2005)	10
<i>Coy v. Iowa</i> , 487 U.S. 1012 (1988)	7
<i>Hoversten v. Iowa</i> , 998 F.2d 614 (8th Cir. 1993)	12
<i>LaBayre v. Iowa</i> , 97 F.3d 1061 (8th Cir. 1996)	13
<i>Maryland v. Craig</i> , 497 U.S. 836 (1990)	<i>passim</i>
<i>Stapp v. Avoyelles Parish School Board</i> , 545 F.3d 527 (5th Cir. 1977)	10
<i>Strouse v. Leonardo</i> , 101 F.3d 107 (2d Cir. Mar. 8, 1996)	10
<i>United States v. Carrier</i> , 9 F.3d 867 (10th Cir. 1993)	9
<i>United States v. Fee</i> , 425 F. App'x 847 (11th Cir. 2011)	12
<i>United States v. Garcia</i> , 7 F.3d 885 (9th Cir. 1993)	8
<i>United States v. Maroun</i> , 930 F.2d 30 (9th Cir. Mar. 21, 1991)	10
<i>United States v. Turning Bear</i> , 357 F.3d 730 (8th Cir. 2004)	9
<i>United States v. Yates</i> , 438 F.3d 1307 (11th Cir. 2006)	8, 11
Federal Statutes	
18 U.S.C. § 922	1
18 U.S.C. § 3509	<i>passim</i>
18 U.S.C. §§ 1153, 2241	1, 4
28 U.S.C. § 1254	2
28 U.S.C. § 1291	2
Constitutional Provisions	
U.S. Constitution, amendment VI	2, 7

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT**

Petitioner, Charles Pete Eyle, respectfully prays that a writ of certiorari issue to review the memorandum of the United States Court of Appeals for the Ninth Circuit, entered on September 18, 2017. App. 2A-4A. Rehearing en banc was denied on December 1, 2017. App. 2D.

OPINIONS AND ORDERS BELOW

On January 13, 2015, the government filed a three-count superseding indictment in district court case 1:14-CR-2058-WFN/No. 16-30158, charging Mr. Eyle with two counts of attempted aggravated sexual abuse and one count of aggravated sexual abuse of a child under the age of twelve. ER 350;¹ *see* 18 U.S.C. §§ 1153, 2241(c). Before trial, the district court, without holding an evidentiary hearing, granted the government's motion to allow D.E., the minor victim, to testify at trial via two-way video under 18 U.S.C. § 3509(b)(1). ER 11, 34-35, 318. Mr. Eyle proceeded to a jury trial, and a jury found him guilty on all three counts. ER 47. Sentencing was held on May 3, 2016, and the district court imposed a mandatory life sentence.² ER 2, 7.

¹ "ER" refers to the excerpts of record filed in the Court of Appeals.

² Mr. Eyle also proceeded to a separate jury trial on a one-count indictment for being a felon in possession of ammunition in violation of 18 U.S.C. § 922(g). ER 46, 356. He was found guilty and sentenced to 120 months, to be served concurrently with the life sentence in the sex-abuse case. ER 2, 7. Mr. Eyle also appealed his sentence in that case to the U.S. Court of Appeals for the Ninth Circuit, which affirmed the sentence. App. 2-3. Mr. Eyle is not seeking review of that sentence before this Court.

Mr. Eyle appealed. On September 18, 2017, a panel of the United States Court of Appeals for the Ninth Circuit affirmed the district court's judgment and sentence. App. 2A-4A. Mr. Eyle then petitioned for rehearing en banc. On December 1, 2017, the Ninth Circuit denied Mr. Eyle's petition. App. 2D.

STATEMENT OF JURISDICTION

The Court of Appeals affirmed the District Court's sentence in this matter on September 18, 2017. On December 1, 2017, the Court of Appeals denied Mr. Eyle's request for rehearing en banc. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 3509(b)(1):

(b) Alternatives to live in-court testimony.--

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

(A) In a proceeding involving an alleged offense against a child, the attorney for the Government, the child's attorney, or a

guardian ad litem appointed under subsection (h) may apply for an order that the child's testimony be taken in a room outside the courtroom and be televised by 2-way closed circuit television. The person seeking such an order shall apply for such an order at least 7 days before the trial date, unless the court finds on the record that the need for such an order was not reasonably foreseeable.

(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.
- (ii) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying.
- (iii) The child suffers a mental or other infirmity.
- (iv) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.

(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.

(D) If the court orders the taking of testimony by television, the attorney for the Government and the attorney for the defendant not including an attorney pro se for a party shall be present in a room outside the courtroom with the child and the child shall be subjected to direct and cross-examination. The only other persons who may be permitted in the room with the child during the child's testimony are--

- (i) the child's attorney or guardian ad litem appointed under subsection (h);
- (ii) persons necessary to operate the closed-circuit television equipment;
- (iii) a judicial officer, appointed by the court; and

(iv) other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child, including an adult attendant.

The child's testimony shall be transmitted by closed circuit television into the courtroom for viewing and hearing by the defendant, jury, judge, and public. The defendant shall be provided with the means of private, contemporaneous communication with the defendant's attorney during the testimony. The closed circuit television transmission shall relay into the room in which the child is testifying the defendant's image, and the voice of the judge.

STATEMENT OF THE CASE

On January 13, 2015, the government filed a three-count superseding indictment in district court case 1:14-CR-2058-WFN charging Mr. Eyle with two counts of attempted aggravated sexual abuse and one count of aggravated sexual abusive of a child under the age of twelve. ER 350; *see* 18 U.S.C. §§ 1153, 2241(c).

Before trial, the government moved to allow D.E., the minor victim, to testify via two-way video on the grounds that she was scared of Mr. Eyle and would likely suffer emotional trauma if required to testify in court. ER 318. In support of its motion, the government submitted a forensic psychological evaluation from Kenneth Muscatel, Ph.D., ER 393-410, and a declaration from FBI Special Agent Peter Orth outlining his conversations with D.E.'s mother, ER 354-55.³

³ The government also submitted a video of a pretrial forensic interview with D.E. The record does not indicate that the district court ever watched the video, however. None of the district court's written or oral findings mention the video, nor did the district court acknowledge viewing it.

Mr. Eyle objected to the proposed video testimony on the ground that there was no evidence to support the conclusion that any fear or trauma that D.E. would suffer if required to testify would be because of Mr. Eyle's presence, and that concluding otherwise would violate Mr. Eyle's confrontation rights. ER 319-20.⁴ Mr. Eyle also specifically requested an evidentiary hearing so that the district court could decide whether video testimony was appropriate. ER 349, 335.

At a pretrial conference, the district court denied Mr. Eyle's request for an evidentiary hearing and concluded video testimony would be allowed under 18 U.S.C. § 3509(b)(1)(B):

I think that that procedure set out in the statute is totally appropriate in this case, a very young female, eight years old, frightened, concerned, distressed, afraid of the defendant. Being with him in the same room, testifying in this environment, would be an emotional trauma for the young child. The procedure set forth in the statute, I think, preserves all the constitutional rights that the defendant has as to confrontation.

ER 11, 318. In a written order, the trial court further found after reviewing "the records":

[T]he victim's mother reports that the victim is fearful of Defendant. The expert who questioned the victim corroborates the mother's statement. The expert notes that the victim tends to shut down when addressing the events leading to Indictment. Additionally, the victim is young and suffers from some cognitive delays.

⁴ In fact, Mr. Eyle had separately moved for a competency hearing of D.E. given that the defense had received evidence that she suffered from cognitive delays. ER 334-36. Mr. Eyle argued that any difficulty D.E. could have on the stand would be related to these problems as opposed to fear or emotional trauma. ER 334-36.

ER 34-35.

Consistent with the district court's ruling, D.E. testified via closed circuit television at trial. ER 174-211. She testified that Mr. Eyle "took off [her] clothes," "put [her] mouth on his nuts," and "lick[ed] [her] private spot." ER 114. When asked on cross examination whether she could see Mr. Eyle in the video she responded in the negative. ER 140. When asked on cross examination whether she liked Mr. Eyle, she responded in the negative. ER 141. When asked whether Mr. Eyle was a "good guy or a bad guy," she responded that she did not know. ER 141. The jury returned a guilty verdict on all three counts of the indictment. ER 47.

On appeal, a panel of the Court of Appeals affirmed the district court's granting of the government's motion to allow D.E. to testify by video. App. 2A-4A. In an unpublished memorandum, the panel held that an evidentiary hearing was not required by either the Sixth Amendment's Confrontation Clause or 18 U.S.C. § 3509, the statute that sets forth alternative procedures to live in-court testimony for children testifying in sex-abuse cases. App. 3A. The panel also held that the district court made findings that D.E. was fearful of Mr. Eyle and that these findings were "appropriate and sufficient to allow video testimony." App. 3A.

Mr. Eyle petitioned the Court of Appeals for rehearing en banc, arguing that the panel's ruling conflicted with this Court's decision in *Maryland v. Craig*, 497 U.S. 836 (1990), and with decisions of the United States Court of Appeals for the Eighth and Eleventh Circuits. After ordering the government to file a response, the Court of Appeals denied the petition. App. 2D.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts with this Court's Decision in *Maryland v. Craig*, Which Required that a District Court "Must Hear Evidence" Before Permitting Testimony by Video.

The Sixth Amendment's Confrontation Clause guarantees an accused the right "to be confronted with the witnesses against him." U.S. Const. amend VI. The Constitution requires a "face-to-face meeting" in order to ensure a witness's reliability and demeanor can be tested properly through cross examination.

Maryland v. Craig, 497 U.S. 836, 844-46 (1990). The policy considerations behind this rule are both strong and obvious: "It is always more difficult to tell a lie about a person to his face than behind his back." *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988) (internal quotation marks omitted).

Although "the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial, [it is] a preference that must occasionally give way to considerations of public policy and the necessities of the case." *Craig*, 497 U.S. at 849 (internal quotation marks and citations omitted) (emphasis in original). Given the gravity of the confrontation right, however, the exception to face-to-face confrontation is a narrow one. *Id.*

In *Craig*, this Court set forth a standard under which a district court is permitted to authorize video testimony while safeguarding a defendant's Sixth Amendment confrontation rights. Specifically, the Court held that a district court "must hear evidence" and determine on a case-by-case basis whether video testimony is "necessary to protect the welfare of the particular child witness." *Craig*,

497 U.S. at 855. “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.” *Id.* at 856. “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.” *Id.* (internal quotation marks omitted).

Following this Court’s decision in *Craig*, Congress codified “alternative procedures to live in-court testimony” in cases involving minor witnesses. *United States v. Garcia*, 7 F.3d 885, 887 (9th Cir. 1993) (citing 18 U.S.C. § 3509(b)(1)). Under § 3509, video testimony may be appropriate if the court finds that the minor is “unable to testify in open court in the presence of the defendant for any of the following reasons”: (1) “[t]he child is unable to testify because of fear”; (2) “[t]here is a substantial likelihood, established by expert testimony, that the minor would suffer emotional trauma from testifying”; (3) the minor “suffers a mental or other infirmity”; or (4) “[c]onduct by the defendant or defense counsel causes the child to be unable to continue testifying.” 18 U.S.C. § 3509(b)(1)(B)(i)–(iv).

This statutory framework supplements, but does not replace, the constitutional inquiry that this Court outlined in *Craig*. *See Garcia*, 7 F.3d at 888; *see also United States v. Yates*, 438 F.3d 1307, 1313 (11th Cir. 2006) (collecting cases). In other words, *Craig* is the constitutional floor, and in order to justify video testimony, the moving party must satisfy the requirements of both *Craig* and the statute. That is, there must be a “case-specific finding that closed circuit testimony

is necessary for a child because the child would suffer more than *de minimis* fear or trauma, and in fact would be unable to testify because of such fear or trauma, brought on by the physical presence of the defendant.” *United States v. Carrier*, 9 F.3d 867, 871 (10th Cir. 1993); see *United States v. Turning Bear*, 357 F.3d 730, 736 (8th Cir. 2004).

In this case, the Court of Appeals held that “neither the Confrontation Clause” (as explained in *Craig*) “nor § 3509 require the district court to hold an evidentiary hearing prior to ruling on the Government’s motion for video testimony.” App. 3A. This holding is in direct conflict with this Court’s decision in *Craig*.

In *Craig*, this Court “decline[d] to establish, as a matter of federal constitutional law, any . . . categorical evidentiary prerequisites” with respect to a district court’s authorization of video testimony. *Craig*, 497 U.S. at 860. What this Court *did* require, however, is that before permitting testimony by video in lieu of face-to-face confrontation, district courts must make a case-specific finding of necessity. *Id.* at 855. Moreover, before making such a finding, the district court “must hear evidence.” *Id.*

While the phrases “hear evidence” and “evidentiary hearing” are not identical, a requirement that a court hear evidence typically means precisely that—that the court should hold an evidentiary hearing. This is clear from the plain text of the Supreme Court’s instruction; the word “hear,” in the legal context, means “to

give a listening to legal arguments in,” “to give a legal hearing to,” or “to take testimony from.” *Hear*, Merriam-Webster Online Dictionary.⁵

It is also clear from the way district courts have interpreted this Court’s instruction that they “hear evidence” before ruling on motions to permit video testimony in cases involving an alleged offense against a child. As Mr. Eyle noted before the Court of Appeals, he has been unable to locate a single instance nationwide in which a federal trial court—other than the court in his case—has found that video testimony would be appropriate under *Craig* without holding a hearing where the parties were able to question, at the very least, the child witness. This applies in other contexts as well: even in cases not involving interpretations of the Confrontation Clause, courts have used the phrase “hear evidence” to connote the action of holding an evidentiary hearing or have used the terms interchangeably. *See, e.g., Stapp v. Avoyelles Parish School Board*, 545 F.3d 527, 534 (5th Cir. 1977); *Strouse v. Leonardo*, 101 F.3d 107, at *2 (2d Cir. Mar. 8, 1996) (unpublished); *United States v. Maroun*, 930 F.2d 30, at *8 (9th Cir. Mar. 21, 1991) (unpublished); *Butler v. Adoption Media, LLC*, 2005 WL 1513142, at *3 (N.D.Cal. June 21, 2005).

The decision of the Court of Appeals held that the Confrontation Clause does not require an evidentiary hearing prior to ruling on a motion for video testimony.

⁵ Available at <https://www.merriam-webster.com/dictionary/hear> (last visited Oct. 2, 2017).

Thus, it is in direct conflict with this Court's decision in *Craig*. This Court should issue a writ of certiorari to resolve that conflict.

II. The Decision Below Conflicts with the Decisions of Other United States Courts of Appeals on the Same Important Matter of What Process Is Due Before a Defendant's Confrontation Rights Can Be Infringed Upon.

In addition to conflicting with *Craig*, the decision of the Court of Appeals is in conflict with the decisions of at least two other Courts of Appeals.

In *United States v. Yates*, the Eleventh Circuit was confronted with two defendants' challenge to the district court's admission of testimony at trial by two-way video conference. *Yates*, 438 F.3d 1307 (11th Cir. 2006). Citing *Craig*, the Eleventh Circuit noted that in determining whether the need for video testimony can legitimately override the defendant's right to confrontation, "[t]he court generally must: (1) *hold an evidentiary hearing* and (2) find: (a) that the denial of physical, face-to-face confrontation at trial is necessary to further an important public policy and (b) that the reliability of the testimony is otherwise assured." *Id.* at 1315 (emphasis added). In finding that the video testimony violated the defendants' confrontation rights, the Eleventh Circuit noted that the district court

held no hearing to consider evidence of the necessity for the video conference testimony. Rather, the trial court allowed the two-way video testimony based only on the Government's assertions in its motion that the Australian witnesses were unwilling to travel to the United States for trial, and the Government's posited important public polic[ies] of providing the fact-finder with crucial evidence, expeditiously and justly resolving the case, and ensuring that foreign witnesses can so testify.

Id. at 1315-16 (citations and internal quotation marks omitted). Similarly, in Mr. Eyle's case, the district court allowed D.E. to testify by video without holding an

evidentiary hearing where, at the very least, the government's proffered evidence could be tested and its witnesses cross-examined. Instead, the district court simply accepted the untested findings contained in the forensic psychological evaluation and the hearsay contained in Agent Orth's affidavit. The Court of Appeals's affirmance of that ruling conflicts with the Eleventh Circuit's authoritative decision in *Yates*. See also *United States v. Fee*, 425 F. App'x 847, 850 (11th Cir. 2011) (unpublished) ("Under *Maryland v. Craig*, after holding an evidentiary hearing, the trial court must make a case-specific finding of necessity") (internal quotation marks omitted).

In addition to the Eleventh Circuit, the Eighth Circuit has also suggested that an evidentiary hearing is required by *Craig* prior to ruling on a motion to allow video testimony. In *Hoversten v. Iowa*, the Eighth Circuit stated that *Craig* "envision[s]" a pretrial hearing where the district court must make the required case-specific findings to justify video testimony. *Hoversten*, 998 F.2d 614, 616 (8th Cir. 1993). The Eighth Circuit went on to find that the use of a one-way mirror at Hoversten's trial violated his confrontation rights where no evidentiary hearing was held, the first trial judge ordered the use of the mirror "before he had seen the child and with no additional evidence about how a face-to-face confrontation might affect her," and the second trial judge ordered it "without seeing the child and Hoversten in the courtroom together and after a colloquy that again contained no mention of the child's likely reaction to Hoversten's presence when she testified." *Id.*

Further, in *LaBayre v. Iowa*, the Eighth Circuit found that the trial court satisfied *Craig* when it conducted a hearing where it “heard evidence [from three witnesses] and made a case-specific finding that the procedure was necessary to protect the boy’s welfare.” *LaBayre*, 97 F.3d 1061, 1062 (8th Cir. 1996). The Eighth Circuit specifically distinguished the case at hand from *Hoversten*, where the Court “granted a habeas petition because the trial court had presumed trauma without conducting a hearing.” *Id.* at 1062-63.

CONCLUSION

The Court of Appeals held that the district court could properly infringe on Mr. Eyle’s confrontation rights without first holding an evidentiary hearing where, at the very least, he could test the assumptions and hearsay assertions contained in the government’s proffered evidence and question the child witness. Mr. Eyle’s constitutional right to be confronted with his accusers should not be so easily circumscribed. For the reasons discussed herein, it is requested that this Court grant this Petition for Writ of Certiorari, reverse the Ninth Circuit’s decision affirming Mr. Eyle’s conviction and sentence, and remand for a new trial and further proceedings consistent with this Court’s opinion.

Dated: March 1, 2018.

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