

**In The
Supreme Court of the United States**

GHASSAN ELASHI; SHUKRI ABU BAKER;
MUFID ABDULQADER; ABDULRAHMAN ODEH,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

**BRIEF OF THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS AS *AMICUS
CURIAE* IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICUS CURIAE*¹

Amicus curiae, the National Association of Criminal Defense Lawyers (“NACDL”), is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL’s objectives are to ensure the proper administration of justice and the appropriate application of criminal statutes in accordance with the United States Constitution. As advocates for the fair and efficient administration of criminal justice, members of the NACDL have a keen interest in assuring that the Sixth Amendment’s Confrontation Clause is upheld and enforced.



¹ Pursuant to Rule 37, *amicus curiae* states that no party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Although counsel for Respondent received notice within ten days of filing, counsel for all parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The right to confront one's accusers is "one of the fundamental guaranties of life and liberty." *Kirby v. United States*, 174 U.S. 47, 55 (1899). And if it means anything, it is that a criminal defendant must be allowed to know the identities of key government witnesses who testify against him. This right is etched into the Sixth Amendment, the historical record from which it emerged, and the longstanding practice of cross-examination which gives it life.

Yet in this case, the Court of Appeals for the Fifth Circuit held that an individual may be prosecuted by anonymous accusers. Two key government witnesses, including an expert, were allowed to testify under a pseudonym – their true identities unknown to the jury, the public, the defendants, and the defense attorneys. In the process, the defendants' fundamental right to confront and examine their accusers collapsed into a balancing test, invoked to accommodate the government's choice of witnesses for prosecution and depriving the defendants the opportunity to independently investigate or fully cross-examine these witnesses. The Fifth Circuit's position has now been joined by the Fourth Circuit in a widening split among courts over whether the Sixth Amendment right to confront one's accusers includes the right to know their identities.

This issue is too important to remain unresolved. Petitioners argue that a writ of *certiorari* should be granted because: (1) the Courts of Appeals have

reached differing conclusions about whether the Confrontation Clause precludes anonymous testimony; (2) the rule adopted by the Fifth Circuit is inconsistent with this Court's prior decisions, particularly *Smith v. Illinois*, 390 U.S. 129 (1968); (3) this case presents an excellent set of facts on which to examine this issue; and (4) this issue is likely to recur. *Amicus* agrees with those reasons.

Amicus writes separately, however, to further explain that the right to know one's accusers lies at the heart of both the history and practice of the right to confrontation. In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court examined the meaning of the Confrontation Clause by tracing its lineage from Roman Law through the Founding era, and then through this Court's prior decisions. *Id.* at 42-50, 57-59. The same exercise – indeed, in many instances the same sources – leads to a similar conclusion here: the right to know one's accusers is an essential feature of the Confrontation Clause and the “crucible of cross-examination” it commands. *Id.* at 61.

A witness's name and identity are used to discover and examine the witness's background, reputation, experience and credibility. And although this is true for all witnesses, it is especially crucial for expert witnesses, who are strategically selected, often unopposed, and given wide latitude at trial. Secret expert witnesses also undermine the truth-finding purpose of the Sixth Amendment, as the defendant is unable at trial and the government unmotivated before trial to fully investigate and test the experts' credibility.

For these reasons, the issue of whether the government may withhold the identity of key witnesses it chooses to present at trial, including expert witnesses, should not await another case.



ARGUMENT

I. The Historical Record Examined in *Crawford* Confirms that the Right to Know the Identity of One’s Accuser has Long Been at the Heart of the Right to Confrontation.

The Sixth Amendment’s Confrontation Clause gives a criminal defendant the right “to be confronted with the witnesses against him.” U.S. Const. amend. VI. Eight years ago, this Court determined that when a question regarding the scope of the Confrontation Clause cannot be answered conclusively by its plain text, “[w]e must . . . turn to the historical background of the Clause to understand its meaning.” *Crawford*, 541 U.S. at 43. That “historical background,” beginning with Roman Law, followed by English law, colonial law, founding era law, and finally this Court’s precedent, removes any doubt that the right “to be confronted with the witnesses” includes the right to know who they are.

A. Early Roman Law prohibited anonymous accusations.

“The right to confront one’s accusers is a concept that dates back to Roman times.” *Crawford*, 541 U.S. at 43 (citing *Coy v. Iowa*, 487 U.S. 1012, 1015 (1988))

and Frank R. Herrmann and Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 Va. J. Int'l L. 481 (1994)). Indeed, perhaps the most famous acknowledgement of a right to confrontation is from Festus, then Governor of Rome, who declared to those clamoring for Paul the Apostle to be condemned to death: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges." Acts 25:16, as quoted in *Coy*, 487 U.S. at 1015-16.

Roman Law did not just recognize a defendant's right to face his accusers, however. It explicitly recognized a defendant's right to know who they were. See Joseph Plescia, *The Bill of Rights and Roman Law* 84 (1995) ("Anonymous accusations were not actionable, because, among other things, the accused . . . had the right to confront his accuser."). For instance, in a letter to Roman Emperor Trajan, a regional governor named Pliny the Younger asked Trajan for advice regarding certain prosecutions in which a "placard was put up, without any signature, accusing a large number of persons by name." See *Letters of Pliny the Younger*, in 2 Pliny, *Letters*, 403-07 (William Melmoth trans. 1915); see also David Lusty, *Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials*, 24 Sydney L. Rev. 361, 363-64 (2002). Trajan responded, "Informations *without the accuser's name* subscribed *must not be admitted in evidence against anyone*, as it is introducing a very dangerous precedent, and by no means

agreeable to the spirit of the age.” Pliny, *supra*, at 407 (emphasis added). Trajan’s instruction that anonymous accusations were not permitted “carried the force of law.” Lusty, *supra*, at 364.

B. Like Roman Law, English common law is also based on informed cross-examination but deviated to a “civil-law practice.”

Although Roman law represents an early and forceful recognition in Western criminal procedure of a right to face – and know – one’s accusers, “[t]he founding generation’s immediate source of the concept [of confrontation] . . . was the common law.” *Crawford*, 541 U.S. at 43. Like Rome, England had a “tradition” of “adversarial testing.” *Id.* But in the period leading up to the drafting of the Sixth Amendment it deviated from this tradition, adopting instead “elements of the civil-law practice” of criminal procedure. *Id.* at 43-45. This deviation towards the “civil-law practice” is critical because it was “the principal evil at which the Confrontation Clause was directed.” *Id.* at 50. This Court has previously highlighted “its use of ex parte examinations,” *id.*, but some of the most notorious practices of the “civil-law practice” involved the use of secret witnesses.

The “civil-law practice” of criminal procedure refers to the process of “inquisition” that took “root on the continent of Europe during the thirteenth century.” Herrmann and Speer, *supra*, at 522. The most infamous uses of the inquisitorial method of criminal prosecution were the European procedures

for inquisition into heresy – known commonly as the “Inquisition” – and the English Court of Star Chamber and trials for treason. *See id.* at 535; Lusty, *supra*, at 366, 370-71; *Crawford*, 541 U.S. at 44.

The procedural deficiencies of the Inquisition are well known. They include both *ex parte* examination of witnesses and torture for confessions. But some of the harshest criticism has been saved for the Inquisition’s removal of a defendant’s right to know *who* his accusers were: “Yet evil as was all this, the *crowning infamy of the Inquisition* in its treatment of testimony was withholding from the accused all knowledge of the names of the witnesses against him.” 1 Henry Charles Lea, *A History of the Inquisition of the Middle Ages* 437 (1922) (quoted in Lusty, *supra*, at 367) (emphasis added). *See also* Arthur Turberville, *The Spanish Inquisition* 97 (1932) (quoted in Lusty, *supra*, at 367) (“The refusal to disclose the identity of his accusers was, however, [the accused’s] most serious disability.”).

Indeed, the use of anonymous witnesses was a unique feature of the Inquisition. Even in the “civil-law practice” of inquisitions for non-heresy crimes, “[b]oth canonical and secular law required that the names of all witnesses be furnished to the accused so that he or she could challenge the reception of their testimony.” Lusty, *supra*, at 365-66 (citing period statutes and treatises). It was only in the most extreme forms of the “civil-law practice” that a

defendant was not entitled to know the identity of those who testified against him.

The “civil-law practice” was used in England, both in the English Court of Star Chamber and in the 16th and 17th century common law trials for treason. These tribunals relied “on secret, anonymous evidence and evidence not adduced in court, and thus to departures from the rule of confrontation.” *R. v. Davis*, [2008] UKHL 36, [5] (U.K.). Though “popular at first,” the “Court of Star Chamber . . . came over time to attract the same popular loathing as the Inquisition,” *id.*, whose “methods . . . including the use of anonymous witnesses, were well known and despised by Englishmen.” Lusty, *supra*, at 372.

“Through a series of statutory and judicial reforms, English law developed a right of confrontation that limited these abuses.” *Crawford*, 541 U.S. at 44. Statutes requiring face-to-face confrontation were enacted, and courts placed a stricter priority on in-person testimony. *Id.* Treatises from the 19th century also confirm that being able to examine a witness’s credibility was a fundamental aspect of criminal procedure:

Where a man’s liberty, or even life, depends upon the testimony of another, it is of infinite importance that those who are to decide upon that testimony should know, to the greatest extent, how far the witness is to be trusted; they cannot look into his breast and see what passes there, but must form their

opinion on collateral indications of his good faith and honesty.

T. Starkie, *A Practical Treatise of the Law of Evidence* 186 (1860).

As noted in *Crawford*, the Framers would have been familiar with the repressive qualities of the Inquisition, the Court of Star Chamber, and certain treason trials, including the infamous trial of Sir Walter Raleigh. *See* 541 U.S. at 43-44 (discussing Raleigh’s case and others) *and* 48-49 (quoting founding-era objection that without a right to confrontation, the proposed federal Constitution would be susceptible to the same abuses). As discussed below, preventing these abuses from recurring later became a rallying cry behind the adoption of the Sixth Amendment.

C. The Sixth Amendment was adopted in response to “civil-law” abuses in Europe and in the Colonies, including trial by anonymous accusation.

The repressive methods of the “civil-law practice” eventually made their way, at least in part, to the American Colonies. *See Crawford*, 541 U.S. at 47 (“Controversial examination practices were also used in the Colonies.”). And, like in England, they provoked a strong reaction, not only to *ex parte* examinations, as discussed in *Crawford*, but also to anonymous witnesses.

As one example, in *Crawford* the Court cited complaints against the colonial governor of Virginia that the governor used procedures allowing inquisition-style *ex parte* examination of witnesses, which did not allow “the person accused . . . to be confronted with, or defend himself against his defamers.” *Id.* at 47 (quoting *A Memorial Concerning the Maladministrations of His Excellency Francis Nicholson* (remainder of citation omitted)). But the same document also decries the colonial governor’s use of secret witnesses: “He encourages all sorts of Sycophants, tattlers and tale bearers, takes their stories in writing & if he can persuade or threaten them to swear to them; without giving the accused person any opportunity of knowing his accusation or accuser.” *A Memorial Concerning the Maladministrations of His Excellency Francis Nicholson*, reprinted in 3 Va. Magazine of History and Biography 373, 378 (1896).

Complaints about anonymous accusations were also raised in Pennsylvania. In 1689, William Bradford was summoned by the colonial governor for allegedly distributing copies of the colony’s charter and constitution. Charles Alan Wright et al., 30 Fed. Prac. & Proc. Evid. § 6344 (2012). After being asked to confess, Bradford responded: “Governor, I desire to know my accusers, I think it very hard to be put upon accusing myself. . . . But if anything be laid to my charge let me know my accusers. I am not bound to accuse myself.” *Id.*

Concerns about a defendant’s right to know and examine his accusers were later addressed in state

constitutions and declarations of rights adopted around the time of the Revolution. Many states adopted rights expressly guaranteeing a right to confrontation. See *Crawford*, 541 U.S. at 48. The Virginia Declaration of Rights, for example, guaranteed criminal defendants the right “to be confronted with the accusers and witnesses.” Section VIII (1776), reprinted in 1 Bernard Schwartz, *The Bill of Rights: A Documentary History* 235 (1971).

The right to confrontation was raised again, several years later, in conjunction with the federal Constitution. During the state ratifying conventions of the late 1780’s, delegates expressed concern that the proposed federal Constitution did not include a right to confrontation. To illustrate the point, they reminded their co-delegates of the dangers of the “civil-law practice” of criminal procedure, which, as discussed above, often featured anonymous accusation. For instance, Abraham Holmes cautioned members of the Massachusetts ratifying convention that without additional constitutional protections “we shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, which has long been the disgrace of Christendom: I meant that diabolical institution, the Inquisition.” 2 Schwartz, *supra*, at 690 (also quoted in *Crawford*, 541 U.S. at 48-49). This concern was echoed in New York by Thomas Tredwell, who invoked the image of the Star Chamber Court. 2 Schwartz, *supra*, at 865.

The importance to our tradition of criminal procedure of knowing the identity of witnesses is evident not only from these references to the Inquisition and Star Chamber Court, but also from related concerns the delegates expressed in regards to the proper setting of a criminal trial. Delegates cautioned against enabling the government to prosecute a defendant in a distant locale expressly for the reason that the witnesses would be unknown. For instance, Holmes criticized the proposed Constitution for not giving a criminal defendant the “right to insist on a trial in the vicinity where the fact was committed, where a jury of the peers would, from their local situation, have an opportunity to form a judgment of the character of the person charged with the crime, and *also to judge of the credibility of the witnesses.*” *Id.* at 689 (emphasis added). Tredwell warned of a defendant “be[ing] dragged to a distant county . . . to be tried by a strange jury, ignorant of his character, *ignorant of the character of the witnesses*, unable to contradict any false testimony brought against him by their own knowledge of the facts, and with whom the prisoner being unacquainted, he must be deprived totally of the benefit of his challenge.” *Id.* at 864-65 (emphasis added). When combined with their references to the Inquisition and Star Chamber Court, these concerns highlight the Framers’ focus on both a defendant’s underlying right to know his accusers and on the importance of enabling a jury to assess the witnesses’ credibility.

As this Court observed in *Crawford*, “[t]he First Congress responded [to such complaints] by including the Confrontation Clause in the proposal that became the Sixth Amendment.” 541 U.S. at 49.

D. This Court has consistently held that knowing a witness’s identity is essential to meaningful confrontation.

This Court’s prior decisions are consistent with the historical understanding that the right to confront one’s accusers includes the right to know their identity. Indeed, the Court has said so explicitly: “The Confrontation Clause . . . ensur[es] that convictions will not be based on the charges of unseen *and unknown* – and hence unchallengeable – individuals.” *Lee v. Illinois*, 476 U.S. 530, 540 (1986) (emphasis added).

This Court has enforced a defendant’s Sixth Amendment right to know the identity of his accuser on at least two occasions. Over 80 years ago, this Court held that a defendant’s Sixth Amendment right was violated where the defendant was not allowed to learn a witness’s address, explaining that a defendant’s right to confrontation includes the “opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test.” *Alford v. United States*, 282 U.S. 687, 692 (1931). Nearly 40 years later, this Court again reversed a conviction where a witness’s name and address had been withheld, reiterating that “when the credibility

of a witness is in issue, the very starting point in ‘exposing falsehood and bringing out the truth’ through cross-examination must necessarily be to ask the witness who he is and where he lives.” *Smith v. Illinois*, 390 U.S. 129, 131 (1968) (quoting *Pointer v. Texas*, 380 U.S. 400, 404 (1965)).

In sum, the right to know one’s accusers has been both long-standing and hard-fought. Only the most abusive forms of the “civil-law practice” have allowed anonymous witnesses, and eradicating those practices was a principle aim of the Sixth Amendment. The history underlying the right to confrontation, as well as the decisions from this Court enforcing it, teaches that knowing an adverse witness’s identity is, like the right to cross-examine testimonial statements analyzed in *Crawford*, fundamental to the right to confrontation.

II. Like the Historical Record, Practice Teaches that Knowing the Witness’s Identity is Essential to a Meaningful Opportunity to Cross-Examine Him.

The right to cross-examine adverse witnesses is essential because it is “the principal means by which the believability of a witness and the truth of his testimony are tested.” *Davis v. Alaska*, 415 U.S. 308, 316 (1974). For this reason, the “cross-examiner has traditionally been allowed to impeach, *i.e.*, discredit, the witness,” and the defendant may not be denied the right “to expose to the jury the facts from which

jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.” *Id.* at 316, 318.

One important method of “attack[ing] . . . credibility is” to direct cross-examination “toward revealing possible biases, prejudices, or ulterior motives of the witness.” *Id.* at 316. In the words of one treatise:

Cross-examination is usually regarded as the means by which adverse witnesses are discredited, and it is for that purpose that it is usually employed by the Bar. The importance of it in that regard is self-evident. If through the instrumentality of the cross-examination the integrity of the witness is destroyed, even though it be not with respect to the particular testimony given at the trial, if his general reputation for truth and veracity is shown to be bad by his own utterances, clearly the examiner has very greatly helped his case.

Francis L. Wellman, *The Art of Cross-Examination* 205 (4th ed. 1997). The importance of examining a witness’s character and credibility has long been recognized. *See, e.g.*, Simon Greenleaf, *A Treatise on the Law of Evidence* 584 (16th ed. 1899) (“The actual character or disposition of the witness is the fact primarily relevant as indicating the probable truthfulness of the witness in his testimony, and the reputation (*i.e.*, the estimation of that character by the community) is merely one source (though the chief

one) of evidence of that character.”). And for these reasons, cross-examination has been called “the greatest legal engine ever invented for the discovery of truth.” 5 John H. Wigmore, *Evidence* § 1367, at 32 (3d ed. 1974).

If cross-examination is the great legal engine for truth, the witness’s name is the key that turns the starter. “The witness’ name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.” *Smith*, 390 U.S. at 131. *See also* 2 Charles Alan Wright et al., *Fed. Prac. & Proc. Crim.* § 258 (4th ed. 2012) (“The names of persons with knowledge of the facts is often the most important information for proper defense of a case.”).

The practical consequences of depriving a defendant and his counsel from knowing the identity of the witness can be illustrated by examples of the tools a defense lawyer would typically utilize to investigate and test the reliability of the witness, but that are foreclosed if the identity of the witness is kept secret:

- disciplinary records;
- criminal records;
- employment history;
- TV or radio appearances;
- prior testimony or publications;

- Internet and social media postings;
- substance abuse problems;
- news stories;
- interviews with acquaintances of the witness regarding his reputation for honesty; and
- interviews with the defendant and others regarding the witness's connection to the facts alleged.

See, e.g., Greenleaf, supra, at 575-91 (discussing evidence used to impeach a witness's credibility, including witness bias, corruption, insanity or intoxication, conviction of crimes, reputation, and prior inconsistent statements). The witness's name is the essential starting point for these lines of inquiry, and these lines of inquiry are the essential starting point for a thorough cross-examination to test the credibility of the witness.

Now consider the ability of the great "legal engine" of cross-examination to function after the following exchange at the trial in this case between the defense attorney and a key government witness:

Q: And there is no way that we could do any research on you or your writings or your work or who you are or your credentials. Right? Because we don't know your real name?

A: Only what you heard here, yes. You cannot research me. That is correct.

(See 7 R.8272.)

Without knowing the witness's identity, the defense attorney had no way of independently investigating or verifying the witness's self-ascribed prior work, credentials, connection to or knowledge of the facts at issue, or character. And except on the basis of information affirmatively provided by the witness, the attorney could not "expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Davis*, 415 U.S. at 318. The great legal engine had come to a halt.

This Court reminded us in *Crawford* that the "ultimate goal" of the Confrontation Clause is "to ensure reliability of evidence," and that the Clause does not leave it to the trial judge, much less the prosecutor or witness, to determine that testimony is sufficiently reliable. 541 U.S. at 61. Instead, reliability must "be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* Because knowing a witness's identity is essential to "the crucible of cross-examination," this case does not simply test the boundary of the Confrontation Clause – it tests its very foundation.

III. Practice Also Teaches that Anonymous Expert Witnesses Present an Especially Severe Threat to the Meaning and Purpose of the Sixth Amendment.

It is well-established that the Confrontation Clause extends to expert witnesses. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 2533-34 (2009). Because government expert witnesses are specially selected, often unopposed and given wide latitude at trial, it is crucial that their testimony and credibility be rigorously examined. By allowing a key government expert to testify anonymously, however, the Fifth Circuit has not only deprived the defendant of the ability to rigorously cross-examine him, but it has also lessened the government's incentive to investigate and select the most credible expert and the expert's incentive to testify accurately. The result violates the defendant's Sixth Amendment right and its truth-finding purpose.

A. Anonymous expert testimony is less likely to be reliable.

As discussed above, “the principal means by which the believability of a witness and the truth of his testimony are tested” is through cross-examination. *Davis*, 415 U.S. at 316. But the accuracy of expert testimony is a function of two other important checks – the government's selection of the expert and the expert's obligation to testify truthfully. To the extent these three mechanisms – careful government

selection, honest testimony, thorough cross-examination – are designed to produce an accurate picture of the facts, allowing an expert to testify anonymously undermines all of them.

As to cross-examination, a defendant’s ability to meaningfully cross-examine an anonymous witness is constrained to an even greater degree when the witness is an expert. Again, it is crucial that a defendant has an “opportunity to place the witness in his proper setting,” from which the jury assesses “the weight of his testimony and his credibility.” *Alford*, 282 U.S. at 692. Because an expert testifies about his special knowledge on a given topic, the expert’s identity, reputation, and background experience *is* the expert’s “proper setting.” See, e.g., *Williams v. Illinois*, 567 U.S. ___ (slip op., at 21) (2012) (Kagan, J., dissenting) (“Scientific testing . . . is only as reliable as the people who perform it.”). Indeed, research into an expert’s background can reveal biases and conflicts of interest that discredit the expert. See, e.g., Gardiner Harris, *Journal Retracts 1998 Paper Linking Autism to Vaccines*, N.Y. Times, Feb. 3, 2010, at A9 (reporting that medical journal retracted article after investigation revealed that author had undisclosed “financial and scientific conflicts,” including that he was paid by interested parties); cf. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 501 n. 17 (2008) (declining, in a non-criminal case, to rely on leading empirical studies because the authors had been funded by one of the parties, Exxon). For these reasons, it is widely acknowledged that “[t]he most important task [a criminal

defense attorney has is] to investigate the opposing counsel's expert witness." Paul J. Ciolino and Grace E. Castle (eds.), *Advanced Forensic Criminal Defense Investigations* 160 (2000). Withholding an expert's identity deprives the attorney of a meaningful opportunity to do so.

Allowing experts to testify anonymously not only undermines the defendant's ability to cross-examine them, but it also reduces the government's incentive to screen and select the best, most credible experts. Unlike with percipient witnesses, the government often has a choice as to whom it will call as a testifying expert on a particular subject, as it did in this case. Aside from the constitutional problems created by allowing the government's prosecution strategy to set the bounds of the defendant's constitutional right to confrontation, *see Melendez-Diaz*, 129 S. Ct. at 2536 (courts "do not have license to suspend the Confrontation Clause when a preferable trial strategy is available"), allowing experts to testify anonymously will distort the government's incentives in making its choice.

The government screens and selects its experts in the shadow of an anticipated future cross-examination. *See Williams*, 567 U.S. ____ (slip op., at 16) (Kagan, J., dissenting) (discussing a prosecutor's incentives in selecting a witness in light of an anticipated cross-examination). It therefore has a strong incentive to independently investigate the candidates' backgrounds and reputations in order to uncover vulnerabilities that could be exposed and used by the defense

attorney to discredit the expert and the government's case at trial. Under the circumstances, the government will favor experts whose credentials, background, reputation, and prior testimony will stand up well during a rigorous cross-examination.

Removing the prospect of a rigorous cross-examination changes the calculation. If the government knows that defense counsel will never know the expert's identity, and thus will not be able to independently examine his background and reputation, the government will have less incentive to do so at the expert-selection stage. The government also will not internalize any deficiencies it has found, knowing that they will likely remain unknown to the defense and the jury. Therefore, anonymous experts will neither be put through the full crucible of cross-examination, nor be scrutinized as closely by the government, and may be selected despite having questionable credibility or reputation. *See Melendez-Diaz*, 129 S. Ct. at 2537 (emphasizing the link between the prospect of cross-examination and the competence of the expert selected because an expert's "lack of proper training or deficiency in judgment may be disclosed in cross-examination"); Richard A. Posner, *Economic Analysis of the Law* 614 (6th ed. 2003) ("Because cross-examination *can* destroy a witness's credibility, it rarely does so in practice, and so is mistakenly denigrated. The witness whose credibility would be destroyed by cross-examination will not be called at all or will try to pull the sting of the cross-examiner by acknowledging on direct examination the facts

that a cross-examiner could be expected to harp on.”) (emphasis in original).

Allowing experts to testify anonymously may also lessen the expert’s incentive to testify accurately. This Court recently observed that the “prospect of confrontation” will both “weed out” fraudulent experts and “deter fraudulent analysis in the first place.” *Mendez-Diaz*, 129 S. Ct. at 2537. But the ability of cross-examination to deter false or exaggerated testimony falters when the expert’s identity is never known and his testimony will never again be linked to him. See Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 Stan. L. Rev. 1477, 1537 (1999) (observing that, in the context of hired experts, expert witnesses are repeat players and therefore have an interest in “preserving a reputation for being honest and competent”). When the expert’s identity is kept secret, the reputation cost of incomplete or inaccurate testimony is reduced nearly to zero.

To summarize, allowing an expert to testify anonymously undermines the defense’s opportunity to meaningfully cross-examine the expert, the government’s incentive to find and select a credible expert in the first place, and the expert’s own incentives to testify accurately. To the extent the Fifth Circuit’s rule intended to provide juries with more complete and more accurate information, yielding more accurate criminal verdicts, it is likely to have the opposite effect.

B. The problem of unexamined or unreliable expert testimony is magnified in criminal trials.

The problem of unexamined or unreliable expert testimony – and the necessity of an opportunity for a thorough cross-examination – is magnified by the unique role that government experts play in criminal trials in three ways.

First, “[u]nlike an ordinary witness . . . an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation.” *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993). Experts are even allowed to testify as to their opinions regarding an ultimate issue. Fed. R. Evid. 704. Because this wide latitude creates the risk of admission of “powerful and quite misleading” testimony, “[v]igorous cross-examination” has been seen as a necessary bulwark against “shaky but admissible” expert testimony. *Daubert*, 509 U.S. at 595-96 (internal quotation marks and citation omitted).

Second, unlike in civil trials, which are often characterized by a “battle of the experts,” in criminal trials, government experts are often unopposed. See David L. Faigman et al., *Modern Scientific Evidence: The Law and Science of Expert Testimony* § 4.20 and n. 2 (2011) (“On the criminal side, there is rarely a battle of experts because the government always has experts . . . and the defense seldom has experts, even for rebuttal purposes.”), Committee on Identifying the

Needs of the Forensic Sciences Community, National Research Council, National Academy of Sciences, Strengthening Forensic Science in the United States: A Path Forward 11 (2009) (“Plaintiffs and defendants, equally, are more likely to have access to expert witnesses in civil cases, while prosecutors usually have an advantage over most defendants in offering expert testimony in criminal cases.”).

The frequency with which a government expert is unopposed is due to many factors, including that many criminal defendants are indigent, public defenders’ requests for expert fees must often meet elevated requirements, and prosecutors have easier access to relevant experts. See Mary Sue Backus et al., *The Right to Counsel in Criminal Cases, A National Crisis*, 57 Hastings L.J. 1031, 1099-1100 (2006) (observing that “the prosecution frequently has at its disposal an assortment of government personnel such as crime investigation and laboratory professionals, psychiatrists, scientists, and doctors”); Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 Cornell L. Rev. 1305, 1312 (2004) (“[T]he greatest disparities occur in the areas of investigators and expert witnesses, with the prosecutors possessing more resources [than the public defenders].”); Carlton Bailey, *Ake v. Oklahoma And An Indigent Defendant’s ‘Right’ To An Expert Witness: A Promise Denied Or Imagined?*, 10 Wm. & Mary Bill of Rts. J. 401, 438 (2002) (observing that to receive funds for experts, indigent defendants must often “show a reasonable probability that an expert

would aid in his defense, and that denial of expert assistance would result in an unfair trial”) (internal quotations omitted).

And third, although the research regarding the influence of expert testimony on jurors is mixed and still evolving, there are indications that jurors may assign it special weight. For instance, one recent study concluded, based on mock-trial studies, that “jurors, perhaps nonconsciously, assume that all expert evidence admitted into a trial . . . has been ‘approved’ by a competent gatekeeper.” See Nick J. Schweitzer and Michael J. Saks, *The Gatekeeper Effect: The Impact of Judges’ Admissibility Decisions on the Persuasiveness of Expert Testimony*, 15 Psychology, Public Policy, and Law 1, 12-13 (2009).

Each of these dynamics – experts’ latitude in testifying, the likelihood they will not be opposed, and their influence – makes it essential that a defendant have a meaningful opportunity to cross-examine experts, the government be encouraged to select the most credible experts, and the experts themselves be fully accountable for their testimony. It is even more so given the stakes: in criminal trials the risk is that “powerful and quite misleading” expert testimony will contribute to wrongful convictions. See, e.g., *United States v. Jones*, 84 F. Supp. 2d 124, 126 (D.D.C. 1999) (granting new trial after revelation that the government’s expert whose “testimony filled in all of the gaps of the government’s case” had lied about his background qualifications); see also *In re Investigation of the W. Va. State Police Crime Lab., Serology*

Div., 438 S.E.2d 501, 520 (W. Va. 1993) (ordering post-conviction review of numerous cases after discovery that a forensic expert had falsified evidence and committed frequent misconduct, resulting in wrongful convictions); Ryan J. Foley, *Expert's Lies Jeopardize Murder Convictions*, USA Today, June 26, 2008 (discussing reversal of convictions in light of revelations that a frequent prosecution expert lied about his credentials).



CONCLUSION

The petition for a writ of certiorari should be granted.

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