09-10560

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MOHAMMAD EL-MEZAIN; GHASSAN ELASHI; SHUKRI ABU BAKER; MUFID ABDULQADER; ABDULRAHMAN ODEH; HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT, also known as HLF
Defendants-Appellants.

On Appeal from the United States District Court
For the Northern District of Texas
Case No. 3:04-CR-240-4 (Jorge Solis, J.)

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANTS' URGING REVERSAL

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Consolidated with
10-10590

UNITED STATES OF AMERICA,
Plaintiff-Appellee-Cross-Appellant,

v.

HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT,
Defendant-Appellant-Cross-Appellee.

Consolidated with
08-10664

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SHUKRI ABU BAKER; MOHAMMAD EL-MEZAIN; GHASSAN ELASHI; MUFID ABDULQADER; ABDULRAHMAN ODEH,
Defendants-Appellants.

Consolidated with
08-10774

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MOHAMMAD EL-MEZAIN,
Defendant-Appellant.

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INTEREST OF AMICUS CURIAE

Amicus National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.[1] NACDL files numerous amicus briefs each year in the Supreme Court and the courts of appeals, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL chose to appear here because the use of anonymous witnesses in a criminal trial presents issues of constitutional importance that stretch beyond the particulars of this case. In the view of the NACDL, because a defendant's right to confrontation of witnesses includes the right to know the identity of the witness, the convictions here must be reversed.

INTRODUCTION

If the Confrontation Clause means anything, it is that a criminal defendant must be allowed to know his accusers so that he may have a fair opportunity to cross-examine them. Yet an expert witness whose testimony was critical to

[1] Counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel further state that the parties have consented to the filing of this brief.

proving the government's case was allowed to testify anonymously against the defendants in this case. He was not just anonymous to the jury or the public, but unknown to the defendants and their attorneys. The defense was thus deprived of any opportunity to investigate and cross-examine him regarding his background, stated experience, reputation in his field of expertise, reputation for honesty, still-unknown biases against defendants, or any other information that might cause the jury to view his testimony in a different light.

The extent to which cross-examination was handicapped was clear at the start of cross-examination of "Avi," a purported member of the Israeli Security Agency and an expert on the Palestinian zakat committees at issue in this case and their alleged connections to Hamas:

> **Q [by defense counsel]**: 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.).

The total secrecy of Avi's identity is unprecedented: no reported cases have ever approved fully anonymous expert testimony like Avi's here. In rare instances, courts have sanctioned the use of pseudonyms or otherwise limited disclosure of certain information on cross-examination. But never before – and we hope never

again – has an American court so completely impaired the right of the accused to cross-examine an expert witness.

The Government's justifications for anonymity are serious and likely to recur. According to Judge Solis, disclosure of the identities of "Avi" and a second anonymous witness, "Major Lior," would harm national security because the names were classified under Israeli law and, by extension, United States law. (*See* 3 R.6315 at 6321.) The Government also asserted – without the benefit of an evidentiary hearing – that each witness's safety would be at risk if his identity was disclosed. Although national security and witness safety are issues that demand a court's sober attention, the Constitution limits the extent to which those interests outweigh a defendant's right to a fair trial, including the right to confront his accusers.

The Court of Star Chamber, the Spanish Inquisition – these are the realm of secret witnesses. If affirmed, this case would not only mark a significant departure from existing case law, but also would stand apart from a deep historical record condemning the use of secret witnesses in criminal prosecutions. Whatever limitations on in-court disclosures may have been appropriate, it is plain that the convictions in this case must be reversed because: **(1)** at a bare minimum, the Sixth Amendment requires that the true identity of an expert witness be known to the defense; and **(2)** the historical record demands that the Confrontation Clause be

read to strictly forbid testimony from secret witnesses, no matter the circumstances.

ARGUMENT

I. The Sixth Amendment Does Not Permit Secret Witnesses.

Two witnesses were allowed to keep their identities secret while offering testimony crucial to the Government's case. In a written ruling on the issue, Judge Solis found that, although relevant, the names were not "material." (3 R.6315 at 6320-21.) And, even if material, the Government's "need to keep the information secret" outweighed the defendants' interest in knowing the identities. (*Id.* at 6321-22.) Whether, under the facts and circumstances of this case, some restrictions on disclosure during cross-examination may have been appropriate is for the parties to litigate. But whether the court could allow a witness to remain secret – not only in public disclosures but also to the accused and their counsel – is a question of fundamental importance already conclusively answered in the negative by our courts, our Constitution, and the authorities and legal traditions upon which the Constitution is founded.

A. The Sixth Amendment Does Not Apply Differently In Cases That Raise National-Security Concerns.

This case implicates national-security concerns not raised in many of the cases construing the Confrontation Clause. (*See* 3 R.6315 at 6319-21 (concluding that "balance of equities lies in Government's favor" because the "Government has

a national security interest in protecting the identities").) But neither the text nor the meaning of the Confrontation Clause is subject to change in difficult cases.

There is no doubt that the district court was "acting in utmost good faith" when it balanced the defense's confrontation rights with the "Government's need to keep the information secret." (*Id*. at 6321.) But the "Framers . . . would not have been content to indulge this assumption." *Crawford v. Washington*, 541 U.S. 36, 67 (2004). The Confrontation Clause is a guarantee etched into our Constitution precisely to provide protection in "politically charged cases . . . – great state trials where the impartiality of even those at the highest level of the judiciary might not be so clear." *Id*. at 68.

Judge Kaplan recently underscored this ideal in another great trial of our day – the first civilian trial of a Guantánamo detainee – when he precluded from trial a government witness who had been discovered only through the CIA's "enhanced interrogation" of the defendant:

> [The Court] is acutely aware of the perilous nature of the world in which we live. But the Constitution is the rock upon which our nation rests. We must follow it not only when it is convenient, but when fear and danger beckon in a different direction. To do less would diminish us and undermine the foundation upon which we stand.

United States v. Ghailani, 1:98-cr-01023, No. 1036 at 2 (S.D.N.Y. Oct. 6, 2010). It is precisely because prosecutions like this one and *Ghailani* –those touching on

the "war on terror" – are difficult that the judiciary must steadfastly observe the rigors of the Sixth Amendment.

B. The Supreme Court Has Already Held That the Identity of a Witness Is Essential to Meaningful Confrontation.

The Constitution guarantees "the accused . . . the right . . . to be confronted with witnesses against him." U.S. Const. amend. VI. Confrontation secures not just the right of the accused to have witnesses testify in court under oath; another "primary interest secured by it is the right of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 315 (1974). Confrontation is, like the right to effective counsel, a component of the Sixth Amendment "right of the accused to require the prosecution's case to survive the crucible of ***meaningful*** adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984) (emphasis added). Confrontation and cross-examination must not simply occur; they must occur in a meaningful fashion, as that term has been defined by the Supreme Court.

Meaningful cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis*, 415 U.S. at 316. And the right extends beyond merely testing "the witness' story . . . perceptions and memory." *Id*. The "cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness." One important method of "attack . . . on credibility is" to direct cross-examination "toward revealing possible biases, prejudices, or ulterior motives of the witness." *Id*. Thus, although a judge has

discretion to limit "repetitive and unduly harassing interrogation," the judge may not deny 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.

The Supreme Court has already held that as part of a meaningful cross-examination, a defendant must have 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). And "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)). The reason is simple: "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." *Id*. In other words, a defendant cannot meaningfully "reveal[] possible biases, prejudices, or ulterior motives" without knowing ***who*** the witness is. *Davis*, 415 U.S. at 316; *accord United States v. Palermo*, 410 F.2d 468, 472 (7th Cir. 1969) (describing procedures trial judges should use under *Smith* and stating that "[u]nder almost all circumstances, the true name of the witness must be disclosed").

Smith follows an earlier case in which the Supreme Court held that the right to confrontation was denied when a witness was permitted to refuse to answer the question "[w]here do you live." *See Alford*, 282 U.S. at 693. That question was essential "to place the witness in his proper setting and put the weight of his testimony and his credibility to a test." *Id*. at 692. In *Alford*, the defendant suspected that the witness lived in federal prison, a fact which would have helped impeach his credibility. *Id*. at 693. But *Alford* was careful to explain that the defendant need not make a showing that some line of questioning will produce valuable impeachment:

> To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.

Id. at 692. The Supreme Court thus implicitly recognized two distinct purposes for questioning a witness about who he is and where he lives: the information is important to allow the jury to know the witness's "proper setting" ***and*** it serves an information-gathering function. The Court made this explicit in *Smith* when it stated that witness identity "open[s] countless avenues of in-court examination and out-of-court investigation." 390 U.S. at 131.

A secret witness, anonymous not just to the jury but also to the defense, is incompatible with these principles. When a witness is secret to all but the

Government, the avenues of investigation are closed off at the start, and the defense is deprived of an opportunity to investigate facts central to impeachment, such as a person's reputation for honesty, bias, prior bad acts, and the like. In such a case, the secrecy "effectively . . . emasculate[s] the right of cross-examination," *id*., resulting in a conviction "based on the testimony of a witness who remains a 'mere shadow' in the defendant's mind."[2] *Siegfriedt v. Fair*, 982 F.2d 14, 17 (1st Cir. 1992) (stating that *Smith*'s "core purpose" is to prevent such a conviction) (citation omitted). Thus, whatever restriction on the scope and extent of cross-examination may be appropriate, the Constitution simply does not permit a testifying witness to remain unknown to the defense.

C. The Sixth Amendment and *Smith* Mean That, At a Minimum, Defense Counsel Must Know The Identity of Testifying Witnesses.

This interpretation of *Smith* – that at a minimum the Sixth Amendment requires disclosure of a testifying witness's identity to defense counsel to allow for meaningful cross-examination – is not novel. In *United States v. Celis*, 608 F.3d 818 (D.C. Cir. 2010), the court had before it defendants who were alleged

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[2] Justice Harlan's dissent in *Smith* underscores that the Sixth Amendment forbids anonymous witnesses. Justice Harlan would have concurred but thought that the case should be dismissed as improvidently granted because, after granting certiorari, the record revealed that defense counsel knew who the witness was and thus there was "serious doubt" whether the defendant was denied any information. 390 U.S. at 134 (Harlan, J., dissenting). Harlan criticized the majority's "dubious" assertion that "perhaps the defense nevertheless did not know" the witness's identity. *Id*. at 135.

members of a drug conspiracy spanning from Colombia to the United States and involving members of FARC, "the most significant drug trafficking organization in Colombia." *Id*. at 826. Further, the court heard evidence that "FARC . . . had threatened to kill cooperating witnesses." *Id*. at 833. As a result, the government requested a protective order "barring the release of the true identities of witnesses from Colombia and allowing these witnesses to testify under pseudonyms." *Id*. at 829.

The district court permitted the use of pseudonyms but "required the government to disclose the witnesses' true identities to defense counsel," who could disclose the information to their clients and, with court permission, investigate the true identities in Colombia. *Id*. at 829, 833. Citing *Smith* and *Alford*, the court of appeals affirmed, holding that the protective order "reflect[ed] an appropriate balancing of interests." *Id*. at 833. Specifically, the order preserved "defense need to prepare to cross-examine . . . by allowing defense access to the true identities . . . days before their testimony and" allowing investigation in Colombia with court approval. *Id*. The court explained that this met the Sixth Amendment's minimum threshold: "[a]lthough defense counsel's frustrations" with having to ask for permission to investigate in Colombia "are understandable, the question . . . is limited to whether . . . confrontation rights were violated," and they were not. *Id*.

The court reached the same result in *United States v. Fuentes*, 988 F. Supp. 861 (E.D. Penn. 1997). There, the government wanted an undercover informant to testify under a pseudonym and remain anonymous to the defense. *Id*. at 862. Because of "serious danger" to the witness and his family in Colombia and because "revealing [his] identity could compromise ongoing D.E.A. investigations," at the outset the court stated its "resolve[] to do everything in [its] power to protect [the witness's] identity consistent with defendants' Confrontation Clause rights." *Id*. at 863. Nevertheless, noting that the "core principles of *Smith* . . . are directly and profoundly implicated," the court refused to allow the government to keep the witness's identity secret from the defense. *Id*. at 864-65. Without knowing his identity, the defense would lose "any possibility of . . . meaningful investigation into [the witness's] background, and it requires the defendants to rely exclusively on the Government for information about" the witness. *Id*. at 865. Even with substantial government disclosures regarding the witness made to placate concerns for confrontation rights, the witness "remains only who the Government says he is . . . he remains largely a phantom." *Id*. at 866; *see also Siegfriedt*, 982 F.2d at 18 (affirming use of pseudonym and distinguishing *Smith* in part because defendant knew true identity before trial and "was able to effectively investigate and impeach" the witness).

Celis and *Fuentes* illustrate the Sixth Amendment's constitutional floor: a court has broad discretion to employ any number of protective measures when appropriate but, at a minimum, the defense must know the true identity of a testifying witness.

1. The Fifth Circuit Has Never Held That a Witness May Keep His Identity Secret.

The Fifth Circuit has never strayed from this constitutional touchstone. Starting with *United States v. Alston*, this Court has examined limitations on disclosure ***during*** cross-examination by asking "whether or not the defendant has had 'sufficient opportunity to place the witness in his proper setting.'" 460 F.2d 48, 51-52 (5th Cir. 1972). In *Alston*, for example, the court held that an undercover narcotics agent could refuse to divulge his home address. *Id*. at 50. Having demonstrated that his home address was immaterial and that witness-safety was an issue, the Court held that the witness was sufficiently "placed" in his setting through disclosure of other relevant background information. *Id*. at 53.

Other cases have also permitted non-disclosure of home address and other background information. *See, e.g., United States v. Contreras*, 602 F.2d 1237, 1239-40 (5th Cir. 1979) (upholding DEA agent's non-disclosure of "prior and present address, his social, political, and civic associations, and his business interests and possible financial troubles"); *United States v. Mesa*, 660 F.2d 1070, 1075 (5th Cir. 1981) (informant's home address). But never has the Fifth Circuit

affirmed when the witness's true identity was unknown to the defense. *See Alvarado v. Superior Court*, 5 P.3d 203, 219 n.11 (Cal. 2000) (exhaustively collecting cases and stating that the court "failed to locate a single case upholding nondisclosure at trial of the identity of a crucial prosecution witness"). Indeed, several cases allowing non-disclosure of certain information, such as the witness's address, justify the non-disclosure in part on the fact that the defendant knew the identity of the witness. *See, e.g.*, *Contreras*, 602 F.2d at 1239 (ample opportunity to place witness in setting because he testified about his "name, age, past and current employment"); *United States v. McKinley*, 493 F.2d 547, 551 (5th Cir. 1974) (same, and holding that witness's credibility "was only marginally at issue"); *United States v. Lewis*, 486 F.2d 217, 218 (5th Cir. 1973) (affirming when witness was not required to disclose his regular employer but did give "full information about [his] identity, background, residence, and type of work").

2. A Witness's Identity Is Even More Important When the Person Is an Expert Witness: an Expert's "Proper Setting" Is His Reputation and Background Experience.

No appellate court has ever permitted anonymous ***expert*** testimony. For good reason: anonymity would handicap cross-examination to a greater degree when the witness is offering expert testimony. 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" from which the jury assesses "the weight of his testimony and his credibility." *Alford*, 282 U.S. at 692.

In addition, cross-examination takes on greater practical importance when the witness is offering purportedly "expert" testimony. "Unlike 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). Though this wide latitude creates risk of admission of "powerful and quite misleading" testimony, "[v]igorous cross-examination" is a primary bulwark against "shaky but admissible" expert testimony. *Id*. at 595-96 (internal quotation marks and citation omitted).

Because of the enhanced risk of unscrupulous testimony, cross-examination of an expert's biases, reputation in the field, and reputation for honesty are of utmost importance to the defense's ability to confront an expert witness. Research into an expert's background can reveal damning biases and conflicts of interest which powerfully discredit the expert. *See, e.g.*, Gardiner Harris, *Journal Retracts 1998 Paper Linking Autism to Vaccines*, New York 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).

More alarming is the danger – unlike in civil cases like *Daubert* – that without vigorous cross-examination, "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 (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, *available at* http://www.usatoday.com/news/nation/2008-06-26-2301015538_x.htm (discussing reversal of convictions in light of revelations that a frequent prosecution expert lied about his credentials). Quite simply, knowledge of a witness's identity for purposes of cross-examination at trial is even more important when, like here, the witness is an expert.

D. Affirming the Convictions Would Create Dangerous New Precedent.

Whether certain protective measures short of the district court's chosen extreme of total anonymity may have been necessary and appropriate to prevent the unwarranted disclosure of classified information or to ensure witness security is

not the issue before this Court. At a bare minimum, the Sixth Amendment required that the defendants and their counsel know the true identities of the witnesses testifying at trial. The court's approval of witness anonymity in this case violated the defendants' right to confront those witnesses.

The expert in this case, Avi, calls out for particular scrutiny. Avi purported to be an attorney and intelligence expert working for the Israeli Security Agency on the battleground issue in this case: whether the zakat committees were sufficiently linked to Hamas.[3] That is, Avi was a secret witness, an agent of a government hostile to the defendants and allied with the United States, providing critical testimony necessary to prove the Government's case. Yet the defendants had no ability to verify his claims of his background training, experience, or knowledge. Defendants could not research Avi to determine what biases – other than that he works for a non-neutral third-party government – might have infected his purported research into the zakat committees. As Avi admitted on the stand at the outset of cross-examination: "outside this court you cannot learn about me. That is correct." (7 R.8273.)

Although the Government's interests in protecting Avi's and Major Lior's identities may be important, they are not unique and will occur in future cases. This Court cannot set a precedent which requires defendants to pay for the

[3] *See, e.g.*, 7 R.7997, 7 R.8021-23, 7 R.8069, 7 R.8169, 7 R.8174, and 7 R.8271-73.

protection of those governmental interests with their constitutional rights. The "legitimate interest in protecting" witnesses "cannot justify depriving the defendant of a fair trial." *Alvarado*, 5 P.3d at 223.

Furthermore, the national-security interests claimed in this case are insufficient to warrant a deprivation of confrontation rights. Judge Solis made no specific findings detailing why some limited disclosure of Avi's and Major Lior's identities would harm American national-security interests. The absence of any specific findings that the disclosure of Avi's and Major Lior's names would harm national-security interests ***in this case*** is fatal to the Government's claim for secrecy. The Supreme Court has already held that, if an exception to traditional confrontation rights is allowed at all, there must be "***individualized findings*** that . . . particular witnesses needed special protection." *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988) (emphasis added). Here, the mere fact that the identities of Israeli Security Agency personnel are presumed classified under an Executive Order is not, without further individualized findings, enough to justify a deprivation of confrontation rights.

More concerning for amicus, if the Court affirms in light of the generalized findings made here, the Court will have created a perverse incentive for prosecutors to seek out purported experts with classified identities whenever feasible. This cannot be the law. While it is true that a court has broad discretion

to balance the competing interests often in play in complicated criminal cases, our Constitution sets forth certain principles, including the right of confrontation, which cannot be eroded at the whim of, and as part of the strategy of, the government. Quite simply, "when nondisclosure of the identity of a crucial witness will preclude effective investigation and cross-examination of that witness, the confrontation clause does not permit the prosecution to rely upon the testimony of that witness at trial while refusing to disclose his or her identity." *Alvarado*, 5 P.3d at 205. While the choice to which the Constitution puts the government is undoubtedly difficult, the choice is nonetheless clear: either the government must offer the testimony of an expert whose identity it can reveal, thus allowing the defendant the full protection of the Sixth Amendment, **or** the government must forgo the expert's testimony, whatever the practical impact on its case.

II. The Historical Record Demands That the Confrontation Clause Be Read to Strictly Forbid Testimony from Secret Witnesses, Whatever the Circumstances.

Although *Smith* and the case law applying *Smith* forbid the sort of secrecy permitted in this case, the testimony of Avi and Major Lior violated the Constitution for the additional reason that the Confrontation Clause should be read to prohibit testimony from secret, anonymous witnesses, whatever the circumstances. As discussed, courts have consistently refused to allow complete witness anonymity and have often used a balancing approach to reach that result.

See, e.g., *Celis*, 608 F.3d at 833 (holding that district court's procedures "reflect an appropriate balancing of interests"); *Alston*, 460 F.2d at 51-52 (assessing totality of disclosures during cross-examination to answer whether, despite non-disclosure of home address, the defendant could "place the witness in his proper setting"). But the Supreme Court's analysis in *Crawford v. Washington*, 541 U.S. 36 (2004), marks a sea-change in how courts should define the limits of the Confrontation Clause. After *Crawford*, the question should no longer be the one set forth in *Alford* and seized upon in *Alston*: given the circumstances, "was the defendant given an opportunity to place the witness in his proper setting?" Instead, the relevant question is a bright-line one: "may a witness, consistent with the right to confrontation, testify without the defense being allowed to ever know who it is?" The historical record teaches that the answer is, emphatically, "No."

A. *Crawford* Shifts How Courts Should Answer Confrontation Clause Questions.

Before *Crawford*, "admission of a hearsay statement" would not "violate the Confrontation Clause if the witness [was] unavailable and the statement [bore] adequate indicia of reliability." *Woodfox v. Cain*, 609 F.3d 774, 799-800 (5th Cir. 2010) (describing *Crawford*'s holding as a "significant[]" change) (internal quotation marks and citation omitted). The test for sufficient indicia of reliability "depart[ed] from . . . historical principles" and was a "malleable standard" which

"often fail[ed] to protect against paradigmatic confrontation violations." *Crawford*, 541 U.S. at 60.

Crawford held that such a balancing approach undermined the Confrontation Clause's original principles. "By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design." *Id*. at 67-68. Thus, the Court held that a bright-line test would apply: "Where testimonial evidence is at issue . . . the Sixth Amendment demands" that the evidence be excluded unless the witness is unavailable and the defendant had a "prior opportunity for cross-examination." *Id*. at 68.

To derive the bright-line rule, the Court surveyed the historical background of the Confrontation Clause. Although the Court noted that "[t]he right to confront one's accusers is a concept that dates back to Roman times," the Court primarily relied on the English common law understanding which would have been "[t]he founding generation's immediate source of the concept." *Id*. at 43. The Court also looked to "[c]ontroversial examination practices . . . used in the Colonies" as evidence of what the Sixth Amendment was intended to protect against. *Id*. at 47.

From its historical review, the Court could draw "two inferences about the meaning of the Sixth Amendment": (1) "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused";

and (2) "the Framers would not have allowed admission of testimonial statements . . . unless [the witness] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id*. at 50, 53-54. The Court explained that the Confrontation Clause – and its new bright-line rule – is not aimed at guaranteeing that evidence is reliable but rather at enforcing the Framers' "judgment . . . about how reliability can best be determined." *Id.* at 61. The Court emphasized that it simply "lack[ed] authority to replace" with a balancing test the Sixth Amendment procedure governing "testimony in criminal trials." *Id*. at 67.[4]

After *Crawford*, the propriety of testimony from an anonymous witness should be viewed through the same historical prism. Like with admission of testimonial hearsay at issue in *Crawford*, the substantive concern with anonymous witnesses is that they may produce less reliable testimony because cross-examination will not be able to sufficiently test it. *See Smith*, 390 U.S. at 131 (the witness's name and address are the "starting point in 'exposing falsehood and bringing out the truth'"). "To be sure, the Clause's ultimate goal is to ensure

[4] It is for this reason – that the Confrontation Clause provides a procedural guarantee of confrontation, not a substantive one concerned solely with providing reliable evidence – that amicus believe the line of cases springing from *Roviaro v. United States*, 353 U.S. 53 (1957), does not speak to the constitutional harm with which amicus is concerned. *Roviaro* is useful to assess whether the government must disclose information regarding a non-testifying informant; i.e., evidence concerning a non-witness. *Id*. at 628. The Confrontation Clause applies to witnesses who "bear testimony," and it is amicus's position that the Confrontation Clause does not permit anonymous witnesses. *See Crawford*, 541 U.S. at 51.

reliability of evidence, but it is a procedural rather than a substantive guarantee." *Crawford*, 541 U.S. at 61. Consequently, following *Crawford*, the primary question should no longer be, "is the witness's identity needed in this case to put the witness in his 'proper setting' so that cross-examination can test 'the truth of his testimony?'" *See Davis*, 415 U.S. at 316; *see, e.g.*, *Alston*, 460 F.2d at 52 (assessing whether, in that case, defendant had "sufficient opportunity to place the witness in his proper setting" (internal quotation marks omitted)). Instead, the Court should ask, "does the Confrontation Clause permit testimony from a witness who remains anonymous to the defense?"

B. The Historical Record, Including The History Cited in *Crawford*, Makes It Clear That The Confrontation Clause Does Not Permit Testimony From Anonymous Witnesses.

With the question framed properly, a review of the history underpinning the right to confrontation gives a simple, unequivocal answer: the Confrontation Clause does not – ever – permit testimony from secret, anonymous witnesses. The sources referenced in *Crawford* and additional sources all teach that knowing ***who*** a witness is – being face to face with an accuser – is as fundamentally necessary to confrontation as subjecting that witness to cross-examination.

1. Early Roman Law Prohibited Anonymous Accusations.

As referenced in *Crawford*, the seeds of the right to confrontation go back at least to the Roman Empire. *See Coy*, 487 U.S. at 1015 (the clause's "lineage . . .

traces back to the beginnings of Western legal culture"). Most famously, when Paul the Apostle was a prisoner of the Roman Governor Festus, Festus is recorded to have said to those clamoring for Paul's 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.

More on point, though, is a letter from Roman Emperor Trajan to a regional governor, Pliny the Younger. *See* Letters of Pliny the Younger, *in* 2 Pliny, Letters, 403-407 (William Melmoth trans., The MacMillan Co. ed., 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). Pliny 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." 2 Pliny, Letters at 403. 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." *Id.* at 407 (emphasis added). Trajan's instruction "carried the force of law." Lusty, *supra*, at 364. Thus, the earliest origins of confrontation prohibited, at a minimum, the admission of ***anonymous*** accusation as evidence.

Although early Roman law may not be "[t]he founding generation's immediate source of the concept" of confrontation, *Crawford*, 541 U.S. at 43, it represents an early and forceful recognition in Western legal procedure of a right to know and face one's accusers.[5] Indeed, no less than Emperor Justinian – who is famous for "codif[ying] the entire corpus of Roman law" – "set[] out" in his Novel 90 the "foundation of the requirements that, in a criminal case, prosecution witnesses had to be produced in court . . . and that the defendant had to have the opportunity to be present when the accusing witnesses were produced." Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 Va. J. Int'l L. 481, 490-91 (1994) (citing Novel 90, as reprinted).

2. The Use of Secret, Anonymous Witnesses Was a Chief Evil of the Worst Examples of the Civil-Law Mode of Criminal Procedure.

As noted above, the "principal evil" at which the Confrontation Clause is

[5] Despite *Crawford*'s discounting of the importance of Roman law, courts have cited Trajan's response to Pliny for historical support. *See Jay v. Boyd*, 351 U.S. 345, 367-68 (1956) (Black, J., dissenting) (citing Trajan and stating that "[n]o amount of legal reasoning . . . and no rationalization . . . can disguise that the use of anonymous information to banish people is not consistent with the principles of a free country"); *State v. Dennison*, 406 S.E.2d 383, 385 (S.C. Ct. App. 1991) (citing Trajan's statement as part of the "lineage" of the "right of confrontation") *abrogated by German v. State*, 478 S.E.2d 687 (S.C. 1996). In fact, courts have cited Trajan's and Pliny's correspondence as historical authority for nearly two centuries. *See, e.g., Bank of Augusta v. Earle*, 38 U.S. (1 Pet.) 519, 576 (1839) (cited for corporate law principles); *Smith v. Smith*, 3 S.C. Eq. 557 (3 Des. Eq. 1813) (same).

aimed is "the civil-law mode of criminal procedure." *Crawford*, 541 U.S. at 50. And, in addition to the "use of *ex parte* examinations as evidence against the accused," *id.*, the most notorious abuses of the "civil-law mode" involved the use of secret witnesses who remained anonymous to the accused.

The "civil-law mode" refers to the process of "inquisition" that took "root on the continent of Europe during the thirteenth century." Herrmann & Speer, *supra*, at 522. By far the most infamous uses of the inquisitorial method of criminal prosecution were the European procedures for inquisition into heresy – known commonly as the "Inquisition" or, in Spain, the "Spanish 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. 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 Id*. at 43-44 (discussing Raleigh's case and others, including *Lilburn's Case*, a Star Chamber prosecution) *and id.* at 48-49 (quoting founding-era objection that without a confrontation right, the proposed Federal Constitution gave Congress "powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, . . . the *Inquisition*" (citation omitted)).

The procedural deficiencies of the Inquisition are well known – including *ex*

parte examination of witnesses and torture for confessions – but some of the harshest criticism has been saved for the Inquisition's removal of the right to know ***who*** the 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 (the MacMillan Co. Ed.1906) (1887) (quoted in Lusty, *supra*, at 367) (emphasis added). *See also* Arthur Turberville, *The Spanish Inquisition* 97 (T. Butterworth, ltd. 1932) (quoted in Lusty, *supra*, at 367) ("The refusal to disclose the identity of his accusers was, however, [the accused's] most serious disability.").[6]

The English Court of Star Chamber and the 16th and 17th century common law trials for treason incorporated the Continent's inquisitorial procedures, and they often denied "frequent demands by the prisoner to have his accusers, i.e. the witnesses against him, brought before him face to face." *Crawford*, 541 U.S. at 43 (internal quotation marks and citation omitted); *see also* Lusty, *supra*, at 371 (quoting protests from defendants making demands to have accusers brought "face to face"). These tribunals relied "on secret, anonymous evidence and evidence not

[6] Indeed, the use of secret witnesses was among the most significant differences between the "Inquisition" and the widespread use of inquisitions for non-heresy crimes. Except for those accused of heresy, "an inquisitional defendant who did not confess guilt could not be convicted unless the witnesses necessary for proof of his guilt were produced before him and took the oath in his presence." Herrmann & Speer, *supra*, at 530.

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.*, and "the English law developed a right of confrontation that limited these abuses." *Crawford*, 541 U.S. at 44.

Crawford also looked to founding-era complaints regarding the use of "[c]ontroversial examination practices . . . in the Colonies." 541 U.S. at 47. Even there, historical evidence indicates that the Confrontation Clause cannot permit anonymous witnesses. For instance, 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)). This ***very 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 (Va. Historical Society, 1896).

Tellingly, the repressive methods used in the Inquisition and in the Court of Star Chamber were initially justified on the same grounds asserted here: national security and witness safety. For instance, the Star Chamber Act (3 Hen VII, c1, 1487) was passed during a trying time of "civil war and public disorder. Corruption and witness intimidation had rendered trial by jury ineffective." Lusty, *supra*, at 370 (citations omitted). *See also* Herrmann & Speer, *supra*, at 535 ("The theory underlying [the rule allowing witness anonymity in the Inquisition] was that heresy was so serious that an accusing witness's safety would be endangered if the defendant knew the witness's identity."). Notwithstanding the threats to security, history has judged those methods harshly. More importantly, the Sixth Amendment rejected those methods by giving a defendant an inviolate right "to be confronted with the witnesses against him."

This history teaches that the knowledge of an adverse witness's identity at trial is, like the right to cross-examination, a fundamental component of the right to confrontation. Only the most abusive forms of the "civil-law mode" have allowed anonymous witnesses. Because the Sixth Amendment was directed toward eradicating the evils of the "civil-law mode," the Confrontation Clause should be read to exclude testimony from witnesses who remain anonymous to the defense.

See Crawford, 541 U.S. at 50.[7]

CONCLUSION

The convictions in this case squarely ask whether the Confrontation Clause guarantees not only the formal right to see the person testifying and to ask questions on cross-examination, but also whether the Confrontation Clause protects a defendant's right to know who he is confronting. Our existing case law and a compelling historical record point to one answer: if a witness is testifying in court, the right to confrontation requires that the defense be allowed to know that person's identity. Because defendants were deprived any knowledge of Avi's or Major Lior's identities, amicus urges the Court to reverse their convictions.

Respectfully submitted,

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[7] In *R. v. Davis*, the highest British court of appeal held that protective measures, including principally the anonymity of witnesses, were contrary to the English common law and "hampered the conduct of the defence in a manner and to an extent which was unlawful and rendered the trial unfair." [2008] UKHL 36 at [35]. Parliament subsequently overturned the effect of this judgment with the Criminal Evidence (Witness Anonymity) Act, 2008, c. 15, which has been called by one commenter "the most serious single assault on liberty in memory." Geoffrey Robertson, *There Can Be No Fair Trials With This Perjurer's Charter*, The Guardian, July 8, 2008 at 28.

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED.R.APP.P. 32(a)(7)(C)

Case Nos. 09-10560, 10-10590, 08-10664, 08-10774

I certify pursuant to Fed. R. App. P. 29(d) and 32(a)(7)(C), the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 6,986 words.

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CERTIFICATE OF SERVICE

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