No. 13-1315

IN THE

# Supreme Court of the United States

TIMOTHY ALAN DUNLAP,

*Petitioner,*

v.

STATE OF IDAHO,

*Respondent.*

**On Petition for a Writ of Certiorari to the Supreme Court of Idaho**

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


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## INTEREST OF *AMICUS CURIAE*[1]

*Amicus curiae* the National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation dedicated to ensuring justice and due process for all those accused of a crime. Founded in 1958, NACDL is now comprised of more than 10,000 direct members and roughly 40,000 affiliate members from all 50 states. The American Bar Association ("ABA") recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

NACDL advances its mission by promoting research in critical areas of criminal justice, by gathering and disseminating relevant knowledge to its members and beyond, and by advocating for the fair and faithful application of both law and punishment. This case presents issues of great concern to NACDL. NACDL members have direct, daily experience with searching cross-examination of witness testimony, and have seen firsthand how it operates to ensure accuracy in the judicial process. As such, NACDL is well-positioned to assist this Court with the recurring and important issues arising from the question presented in this case.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* certifies that counsels of record for both petitioner and respondent have, after timely notification, consented to this filing in letters on file with the Clerk's office.

## INTRODUCTION

*Amicus* writes separately to note that this case offers an opportunity for the Court to correct a broad misunderstanding of the Sixth Amendment's scope. While Petitioner is correct in his assertion that the Confrontation Clause applies to evidence presented at sentencing to demonstrate eligibility for the death penalty, the Clause reaches a broader set of evidence than capital *eligibility* evidence alone. Both the plain text of the Sixth Amendment and this Court's opinions construing it demonstrate that the Sixth Amendment applies, at a minimum, to all contested evidence offered at capital sentencing proceedings. This Court has recognized such a scope for the Fifth Amendment and no justification exists for treating the Sixth Amendment differently, especially in the context of the penalty phase of a capital trial.

The question is of significant importance. Testimony offered and facts alleged during capital sentencing proceedings can, as here, make a literal difference between life and death. This is so when testimony is offered to prove eligibility criteria, but also when it is offered, as it routinely is, at the selection stage of capital sentencing, during which the jury decides whether a death-eligible defendant should indeed be put to death. Evidence offered during this stage is not only of considerable consequence, but is also highly factual in nature. By enabling a defendant to face and question his accusers, the Confrontation Clause assures the accuracy of testimony offered and, consequently, the legitimacy of the eventual result. This is as crucial during all stages of the penalty phase of a capital trial as it is during the guilt phase.

## I. WHETHER THE CONFRONTATION CLAUSE APPLIES DURING CAPITAL SENTENCING HEARINGS IS UNRESOLVED.

1. Application of the Confrontation Clause to capital sentencing proceedings differs widely among the state high courts and the federal courts of appeals. Some have held that the Confrontation Clause does apply to testimony offered during capital sentencing. In *Proffitt* v. *Wainwright*, the sentencing judge considered a psychiatrist's written evaluation of the defendant without affording the defendant "an opportunity to cross-examine him about the report." 685 F.2d 1227, 1250 (11th Cir. 1982). The court found this violated the Confrontation Clause, which guaranteed the defendant the "right to cross-examine adverse witnesses [during] capital sentencing proceedings, at least where necessary to ensure the reliability of the witnesses' testimony." *Id.* at 1255. The *Proffitt* court observed that "[t]he focus of [the Supreme] Court's current capital sentencing decisions . . . [is on] minimizing the risk of arbitrary decisionmaking," adding that "[r]eliability in the factfinding aspect of sentencing has been a cornerstone of these decisions." *Id.* at 1253.

Critically, *Proffitt* also acknowledged this Court's holding in *Williams* v. *New York* that the Fourteenth Amendment did not prohibit a sentencing judge from considering "information . . . obtained outside the courtroom from persons whom a defendant has not been permitted to confront or cross-examine." 337 U.S. 241, 245, 252 (1949). But the Eleventh Circuit concluded that *Williams* no longer controlled the issue, suggesting it hinged on the notion "that the procedural requirements applicable to capital sentencing are no more rigorous than those governing noncapital

sentencing," a position which "is no longer valid." *Proffitt*, 685 F.2d at 1253. See also *United States* v. *Fields,* 483 F.3d 313, 366 (5th Cir. 2007) (Benavides, J., concurring in part and dissenting in part) ("Ultimately, *Williams* provides little guidance because '[t]he bases of the *Williams* decision . . . have been eroded as applied to capital cases.'" (quoting *United States* v. *Taveras,* 424 F. Supp. 2d 446, 457 (E.D.N.Y. 2006))).

In *State* v. *Bell*, the Supreme Court of North Carolina similarly held that the defendant's confrontation rights were violated when the statement of an available witness to a prior crime was read into evidence at the defendant's capital sentencing hearing. 603 S.E.2d 93, 116 (N.C. 2004). Moreover, at least one district court presented with the opportunity also has concluded that the Clause applies to contested evidence offered not only during the eligibility stage of capital sentencing but during selection as well. See *United States* v. *Mills,* 446 F. Supp. 2d 1115, 1131 (C.D. Cal. 2006).[2]

Other courts have disagreed. Like the Idaho Supreme Court's decision here, those courts have held broadly that "the Confrontation Clause does not apply at sentencing proceedings," capital or otherwise. Pet. App. 55a; see also *Fields*, 483 F.3d at 334-35 (majority opinion); *Szabo* v. *Walls*, 313 F.3d 392, 398 (7th Cir. 2002); *State* v. *McGill,* 140 P.3d 930, 941 (Ariz. 2006) (en banc); *Summers* v. *State*, 148 P.3d 778, 783 (Nev. 2006). Courts on this side of the ques-

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[2] Certain state high courts have extended this reasoning further still, holding that the Confrontation Clause applies in all sentencing hearings—capital and non-capital alike—where evidence is presented to a jury. *See Vankirk* v. *State*, 385 S.W.3d 144, 151-52 (Ark. 2011); *State* v. *Rodriquez,* 754 N.W.2d 672, 680-81 (Minn. 2008).

tion have continued to "adhere to the logic of *Williams*" despite recognizing that it is "not explicitly a Sixth Amendment case." *Fields*, 483 F.3d at 327. Downplaying this distinction, they have noted that *Williams* "plainly discussed the right of confrontation" and "has never been overruled." *Id.* This long entrenched division of authority is ripe for review and is of surpassing importance to ongoing capital trials. As noted, in a number of jurisdictions with frequent capital trials, including those states in the Fifth Circuit and Arizona, defendants and counsel contesting life and death matters have no recourse to cross-examination in order to test the statements of accusers. There is no reasoned basis for such a limitation on cross-examination.

2. Both the text of the Sixth Amendment and the Court's precedents render the Confrontation Clause applicable to all contested evidence offered during capital sentencing hearings. The Clause explicitly applies to "all criminal prosecutions." U.S. Const. amend. VI. And while "[t]here is virtually no evidence of what the drafters of the Confrontation Clause intended it to mean," *White* v. *Illinois*, 502 U.S. 346, 359 (1992) (Thomas, J., concurring in the judgment), their words are sufficiently clear to determine its scope. As one judge put it: "Surely no one would contend that sentencing is not a part, and a vital one, of a 'criminal prosecution.'" *United States* v. *Wise*, 976 F.2d 393, 407 (8th Cir. 1992) (Arnold, C.J., concurring in part and dissenting in part). Indeed, "the Framers of the Bill of Rights knew nothing of sentencing proceedings separate from the trial itself." *Id.*; see also Note, *An Argument for Confrontation Under the Federal Sentencing Guidelines*, 105 Harv. L. Rev. 1880, 1888 (1992) ("At the time of the framing of the Sixth Amendment, trial and sentencing were

not distinct; conviction for a particular crime almost automatically led to the imposition of a legislatively-prescribed punishment."). But certainly in today's bifurcated capital proceedings, it cannot be said that the prosecution ceases at the conclusion of the guilt phase. Much of a prosecutor's work—and frequently most of it—comes after this point. This is a result both of legislative schemes which increasingly reserve the question of death eligibility for sentencing, see *Ring* v. *Arizona,* 536 U.S. 584, 611-12 (2002) (Scalia, J., concurring), and of the importance of mitigation efforts at the selection stage to defendants whose guilt is not in doubt, see *Williams* v. *Taylor,* 529 U.S. 362, 396 (2000).

The prominent role of sentencing in the capital prosecution process has long animated this Court's Sixth Amendment jurisprudence. The right to counsel, likewise applicable "[i]n all criminal prosecutions," U.S. Const. amend. VI, has been held to apply in equal force during all sentencing hearings. See *Mempa* v. *Rhay*, 389 U.S. 128, 137 (1967). *Mempa* reflects this Court's judgment that "sentencing is a critical stage of the criminal proceeding," *Gardner* v. *Florida*, 430 U.S. 349, 358 (1977) (plurality opinion), and that any hearing which may result in "any amount of [additional] jail time has Sixth Amendment significance," *Lafler* v. *Cooper*, 132 S. Ct. 1376, 1386 (2012) (quoting *Glover* v. *United States*, 531 U.S. 198, 203 (2001)). In guaranteeing an accused the right to counsel, the Framers evinced concern that a defendant's rights would fall victim to procedures he did not understand. *Gideon* v. *Wainwright,* 372 U.S. 335, 344 (1963). This Court has long recognized that their well-founded fear applied equally to sentencing.

Where a potential sentence of death hangs in the balance, that fear cannot be less with respect to Con-

frontation Clause rights. The right to counsel may protect the accused from procedural traps, but it means little from a substantive standpoint if counsel has no means to test the veracity and impact of the prosecution's proffered facts and testimony. The very "mission of the Confrontation Clause is to advance . . . the truth-determining process in criminal trials . . . ." *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970) (plurality opinion). The need for such fidelity is not unique to the determination of guilt. In fact, this Court has repeatedly recognized "the 'heightened need for reliability' in capital sentencing." *Romano* v. *Oklahoma*, 512 U.S. 1, 19 (1994) (quoting *Caldwell* v. *Mississippi*, 472 U.S. 320, 323 (1985)). It strains reason to suggest the Framers intended the procedural protections afforded by adequate representation to last through the imposition of punishment, but for the great guarantor of truth to stop short of that point precisely when it is most needed. See Note, *supra*, at 1887-91. Yet the Idaho Supreme Court, and those it followed, have held precisely that.

In refusing to recognize confrontation rights at capital sentencing, those courts contravene this Court's recent jurisprudence construing the Confrontation Clause itself. The Court has made clear that the Clause "applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" *Crawford* v. *Washington*, 541 U.S. 36, 51 (2004) (quoting 2 N. Webster, *An American Dictionary of the English Language* (1828)). Statements introduced by the prosecution against the defendant in an adversarial manner fit squarely into this category. It matters little whether they are used to demonstrate eligibility for punishment in general (guilt phase) or eligibility for a certain type of punishment (penalty phase). Here, for example, the prosecution moved for the admission of

the report at issue, commented upon it during closing arguments, and reminded the jury of its availability "in evidence." Pet. Cert. 24. Of the "two classes of witnesses—those against the defendant and those in his favor," *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 313 (2009), the report and its author belong quite clearly in the "against" class. As this Court has stressed, "there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." *Id.* at 314. For out-of-court statements introduced by the prosecution, these exclusive categories also hold at sentencing.

Courts holding to the contrary have dismissed concerns about the accuracy of such evidence by observing that sentencing "judges must limit consideration to information that has sufficient indicia of reliability to support its probable accuracy." *United States* v. *Roche*, 415 F.3d 614, 618 (7th Cir. 2005) (quotation marks and citation omitted), *abrogated in part on other grounds by Kimbrough* v. *United States*, 552 U.S. 85 (2007). But this is simply a retreat to a rejected test (*Ohio* v. *Roberts*, 448 U.S. 56 (1980)) and *Crawford* makes clear that "indicia of reliability" are not substitutes for confrontation. See *Crawford*, 541 U.S. at 60 (abrogating *Roberts*); see also Jeffrey L. Fisher, *Originalism as an Anchor for the Sixth Amendment*, 34 Harv. J.L. & Pub. Pol'y 53, 58-59 (2011). The corollary argument that "criminal procedures . . . already give ample protections" against false testimony, *Melendez-Diaz*, 557 U.S. at 331 (Kennedy, J., dissenting), likewise has been advanced and rejected by this Court. *Id.* at 318 (majority opinion) ("Respondent and the dissent may be right that there are other ways—and in some cases better ways—to challenge or verify the results of a forensic test. But the Constitution guarantees one way: con-

frontation."). Confrontation, as all constitutional medicines, is a mandatory prescription.

Petitioner argues that the confrontation right need only reach as far as evidence offered to prove death eligibility at sentencing. Pet. Cert. 18-23. To be sure, as the foregoing demonstrates, such evidence is properly within the scope of the Sixth Amendment. But so too is evidence offered at capital sentencing hearings for other purposes, including to persuade the decision maker that a death sentence is not just permissible, but warranted. This Court has previously recognized the importance to the "truth-seeking function of trials" of any "facts which may influence the sentencing decision in capital cases." *Gardner*, 430 U.S. at 360. Facts contained within selection stage testimony undoubtedly carry such influence. Put another way, eligibility is but the first step; selection completes the task. As "[n]owhere is the need for accuracy greater than when the State . . . takes the life of one of its citizens," *Sawyer* v. *Whitley*, 505 U.S. 333, 366 (1992), *superseded by statute*, AEDPA, 28 U.S.C. § 2244(b)(2), *as recognized in In re Hill*, 715 F.3d 284 (11th Cir. 2013), the Clause whose very aim is accuracy should apply throughout. Cf. *Ring*, 536 U.S. at 618 (Breyer, J., concurring) (arguing "strongly for procedures that will help assure that, in a particular case, the community indeed believes application of the death penalty is appropriate . . . ."). Moreover, capital sentencing proceedings in some states, including Idaho, are not broken into eligibility and selection stages. See Idaho Code § 19-2515(5)(a) (describing the "special sentencing proceeding" held "for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense."). Rendering the Confrontation Clause applicable to eligibility evidence but not to selection evidence

would prove a difficult distinction to enforce in those jurisdictions.

3. Rendering the Sixth Amendment wholly applicable to capital sentencings would further accord with this Court's Fifth Amendment jurisprudence. This Court has held that where "the sentencing proceedings . . . [are] like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause . . . is available . . . , with respect to the death penalty . . . ." *Bullington* v. *Missouri*, 451 U.S. 430, 446 (1981). Moreover, another Fifth Amendment right, the privilege against self incrimination, applies during all sentencing hearings. *Mitchell* v. *United States*, 526 U.S. 314, 327 (1999). Relying partially on "common sense," the *Mitchell* Court observed that in that case, "as is often true in the criminal justice system, the defendant was less concerned with the proof of her guilt or innocence than with the severity of her punishment." *Id.* Thus, to hold the privilege not applicable during sentencing would deprive her of its protection "at the precise stage where, from her point of view, it was most important." *Id.*

The same rationale should produce a similar recognition of Sixth Amendment protections at capital sentencing. This is especially so considering the "special seriousness of the risk of improper sentencing in a capital case." *Turner* v. *Murray*, 476 U.S. 28, 37 (1986). Moreover, as noted, separate sentencing hearings were unknown to the Framers. *Wise*, 976 F.2d at 407 (Arnold, C.J., concurring in part and dissenting in part). It makes little sense to hold that Fifth Amendment protections are applicable throughout the modern, bifurcated capital prosecutions, but Sixth Amendment protections are somehow not. *Mitchell's* "common sense" reasoning dictates the

same result: Like its Fifth Amendment counterparts, the Confrontation Clause's utility will frequently prove more acute at sentencing than during the guilt phase.

The texts of the Fifth and Sixth Amendments offer no support for asymmetrical application. While the Fifth Amendment provides that "[n]o *person* . . . shall be compelled in any criminal *case* to be a witness against himself," U.S. Const. amend. V (emphasis added), the Sixth protects only "the *accused*" during a "criminal *prosecution*[]," U.S. Const. amend. VI (emphasis added). However, this difference is of no moment with respect to the rights of a criminal defendant who is the accused and who is subject to a criminal prosecution, much less a capital one. It cannot be said that a "case" encompasses sentencing while a "prosecution" does not. Though Fifth Amendment *rights* may be asserted in a broad range of contexts, like the Sixth Amendment, its "*violation* occurs only at trial." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (emphasis added). Rather the difference between "case" and "prosecution" is one of the proceeding's relation to those protected: While the Fifth Amendment protects all individuals during any criminal proceeding, the Sixth Amendment protects only the defendant during his. This Court has determined that sentencing proceedings are part of a criminal case. See *Mitchell*, 526 U.S. at 327. It now has the opportunity to make the very short step in holding that, in the capital context, they are likewise part of a criminal prosecution.

4. This Court need not overturn its prior decision in *Williams*. First, as courts have been quick either to highlight or to gloss over, *Williams* was a due process rather than a Confrontation Clause case. But there is another, less formalistic, way to distinguish that

case. *Williams* involved "information obtained through the court's Probation Department," 337 U.S. at 242 (quotation marks omitted), rather than information adduced by the prosecution. In *Williams*, the reports were provided directly to the trial court by "[p]robation workers . . . [who] have not been trained to prosecute but to aid offenders." *Id.* at 249. Indeed, this Court has previously observed that sentences are frequently "the result of inquiry that is nonadversary in nature." *United States* v. *DiFrancesco*, 449 U.S. 117, 137 (1980). Where this is the case, there is firm basis to suggest not only that such testimony differs from that considered here, but also that it is not offered "*against*" the accused for Sixth Amendment purposes.

Such a distinction would preserve more than just *Williams*. It would also assure that judges could continue to rely on the work of probation officers and pre-sentence reports without requiring those who assemble them to be subjected to cross-examination. This also would be an easy line to police. However, where the prosecution seeks to introduce testimonial statements at sentencing, the declarants are "witnesses against" the defendant, U.S. Const. amend. VI, and must be made available for cross-examination "unless [they are] unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 54. Where, however, the court considers, *sua sponte*, statements from a neutral, administrative body, it does so free of Sixth Amendment scrutiny.

## II. THIS COURT'S REVIEW IS NECESSARY TO ENSURE THAT STATES MAY NOT STRATEGICALLY ELUDE CROSS-EXAMINATION OF CRITICAL EVIDENCE.

The absence of the confrontation right at capital sentencing may entice states to push critical evidentiary issues to sentencing, bypassing "the crucible of cross-examination." *Crawford*, 541 U.S. at 61-62. This should not be permitted. The object of the Confrontation Clause is simple: the truth. It embodies the Framers' judgment that a witness's "reliability can best be determined," *id.*, through "rigorous testing in the context of an adversary proceeding before the trier of fact," *Maryland* v. *Craig*, 497 U.S. 836, 845 (1990). States cannot simply opt out of this scheme.

How—and why—the Clause must operate is clear. While lying on an affidavit may prove easy to some, standing before the accused triggers "something deep in human nature" that makes the task much more difficult when the lie is delivered "to his face [rather] than behind his back." *Coy* v. *Iowa*, 487 U.S. 1012, 1017-19 (1988). In conjunction with the oath he must take, the witness's presence in the courtroom impresses upon him the gravity of the situation—and the centrality of his own role in it. Moreover, the jury is afforded the opportunity to observe how the witness appears while testifying, and to assess for itself his credibility. But most importantly, a present witness may be subject to cross-examination, "the greatest legal engine ever invented for the discovery of truth . . . ." *California* v. *Green*, 399 U.S. 149, 158 (1970).

Cross-examination enables the defendant to explore, uncover, and expose the inconsistencies and biases in testimony that may not be apparent at first blush. It ensures the jury will do more than simply

accept wholesale the government's assertions, "minimiz[ing] the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony." *Taylor* v. *Illinois*, 484 U.S. 400, 411-12 (1988). And for this reason, it incentivizes witnesses to come prepared and speak truthfully, and governments to carefully vet those upon whom their prosecutions depend. In short, cross-examination is the stick, and truth the carrot.

The need to ensure truth during capital sentencing has never been greater. Sentencing hearings following conviction for death-eligible crimes increasingly resemble trials, not only because they are frequently pitched to juries, and involve new factual evidence, but because, "[w]ithout question, the stakes are high." *Mitchell*, 526 U.S. at 329. As discussed *supra*, defendants are often concerned with little else *but* sentencing. This is no accident. Legislatures have driven this shift in focus by reserving consequential issues for sentencing in the form of sentencing factors, aggravators, and enhancements. As here, these are often intensely factual.

To be sure, defendants are not helpless. In *Apprendi* v. *New Jersey*, this Court held that sentencing factors with the potential to increase a defendant's penalty must be proven to a jury beyond a reasonable doubt. 530 U.S. 466, 490 (2000). This holding thwarted what the Court considered "an unacceptable departure from the jury tradition," *id.* at 497, and restored responsibility for critical facts to the fact finder. But if *Apprendi* and its progeny reveal this Court's commitment to ensuring constitutional fidelity in sentencing schemes, they have not finished the job. Demanding proof beyond a reasonable doubt affords some protection, but as here, facts so proven are frequently immune from confrontation. Moreover,

*Apprendi* by its very terms reaches only a subset of the facts alleged during sentencing hearings. Facts which may trigger a significantly harsher penalty within a range provided by the legislature and authorized by the jury's verdict also should not be admitted without confrontation.

Only cross-examination can provide defendants adequate protection in this area. A sentencing judge's discretion is broad, but it is not absolute. See *id.* at 481-82. At the very least, it is bound by the mandate of truth. The Confrontation Clause can ensure that sentencing meets this threshold.

## CONCLUSION

For these reasons, and those stated by Petitioner, the Court should grant the petition.

Respectfully submitted,

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