No. 19-361

In The
Supreme Court of the United States

RENADO SMITH AND RICHARD DELANCY

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* THE
CONSTITUTION PROJECT AT THE PROJECT ON GOVERNMENT OVERSIGHT, IN SUPPORT OF PETITIONERS

KEVIN B. MUHLENDORF
COUNSEL OF RECORD
BERT W. REIN
TATIANA SAINATI
MICHELLE B. BRADSHAW
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006

202.719.7000
kmuhlendorf@wileyrein.com

Counsel of Record for Amicus Curiae
The Constitution Project at the
Project On Government Oversight

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

The Constitution Project at the Project On Government Oversight is a nonpartisan nonprofit organization that seeks solutions to contemporary constitutional issues through scholarship and public education. One of The Constitution Project's key areas of focus is the constitutional imperative of procedural fairness and due process in the criminal justice system, and particularly at trial. The Constitution Project is deeply concerned with the preservation of our fundamental constitutional rights and guarantees, and ensuring they are respected and enforced by all three branches of government.

The Constitution Project regularly files amicus briefs in this Court and other courts in cases, like this one, that implicate its views on constitutional issues, in order to better apprise courts of the importance and broad consequences of those issues. The Constitution Project has particular expertise, knowledge, and interest in the fair administration of criminal law, consistent with the United States Constitution. The Constitution Project's work and mission bear directly on the issue of confrontation and proof at both trial and sentencing, particularly in capital proceedings. Amicus has filed this brief to highlight the need for the Court to resolve the lower courts'

[1] Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

incongruent application of the good faith standard that has deprived defendants like Petitioners of their Confrontation Clause rights at trial.

INTRODUCTION AND SUMMARY OF ARGUMENT

The government's pursuit of criminal charges subjects defendants to the threat of deprivation of life, liberty, and property under law. To ensure that the criminal justice system afforded defendants "due process," and cognizant of the tyrannical history of the English Star Chamber, the drafters of the Sixth Amendment provided defendants a right to a public jury trial in which they would face known charges, have the ability to confront accusing witnesses, and use the power of the court to command the presence of witnesses favorable to their cause. The right of confrontation has been held to include both the right to cross-examine adverse witnesses and to have a jury determine their credibility through live testimony.

While the language of the Sixth Amendment is absolute, this Court has acknowledged that there may be situations where witnesses whose previous sworn testimony was subject to cross-examination by the defense cannot be available at trial. Recognizing that the interests of justice and realities of criminal law administration sometimes are at odds with an absolute right to cross-examine at trial, courts, including this one, interpreting the Sixth Amendment have established a rule of necessity. This rule provides that the government may use a witness's out-of-

court testimony only if the government adequately demonstrates that the witness is unavailable. This rule reflects and preserves "the Framers' preference for face-to-face accusation," while at the same time promoting the interests of the citizenry in having effective criminal trials. *Idaho v. Wright*, 497 U.S. 805, 814 (1990). To implement that balancing of interests, the government must demonstrate unavailability despite a "good-faith," reasonable effort at locating the absent witness. *California v. Green*, 399 U.S. 149, 189 n.22 (1970) (Harlan, J., concurring).

As Petitioners argue, the application of this somewhat vague standard of reasonableness has led to a confusing assortment of results in the circuits. The Eleventh Circuit's disposition of this case highlights the danger such an uncertain standard presents to the Confrontation Clause. Here, the government's attempts to locate the missing witness were lackluster. The prejudice Petitioners suffered from this unreasonable search was exacerbated by the absence of a clear mandate that the government give timely notice of the witness's unavailability.

The government candidly conceded below that it curtailed its search for its key witness—who provided the only direct evidence of a required element of Petitioners' alleged crime—because it already had her qualified deposition testimony. The government mistakenly released the witness from custody, lost track of her prior to trial, failed to issue a trial subpoena or seek her out until the eve of trial, and even then neglected to undertake the simple investigative step of typing a

name into a law-enforcement database to find the witness's location. *See* Pet. App. at 103a-105a, 122a, 150a, 158a. More troubling still, the government failed to inform the defense of its inability to locate the witness until the day before her scheduled testimony, well into trial. *Id.* at 14a.

The effective ambush the Eleventh Circuit majority permitted in this case cannot be squared with the guarantees the Founders enshrined in the Sixth Amendment. In the same way that this Court has developed guidance for the disclosure of *Brady* materials, the Court here can, and should, provide similar timeliness guidance for the enforcement of the Sixth Amendment's confrontation requirement. Timely disclosure jurisprudence under *Brady* imposes a clear standard that ensures fair trial rights: enabling the defense to make effective use of the information. *See United States v. Calderón*, 578 F.3d 78,93 (1st Cir. 2009), *cert. denied*, 130 S. Ct. 1107 (2010); *see also Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). This case presents an opportunity for the Court to harmonize the application of the Confrontation Clause's good faith standard through the prism of *Brady*'s well-established body of law by requiring the government to provide timely notice that a witness will be unavailable for trial.

Amicus therefore urges this Court to grant *certiorari* to establish a clear good faith standard. This Court's intervention is critical to resolve the circuit split on implementing the good faith standard that Petitioners identified. Amicus also

believes the proposed timeliness requirement will prevent the unavailability exception from swallowing the confrontation rule at the heart of the Sixth Amendment.

ARGUMENT

I. DEFENDANTS' RIGHT TO CONFRONT ADVERSE WITNESSES IN COURT IS A CONSTITUTIONAL GUARANTEE DESERVING THE HIGHEST PROTECTIONS.

The Sixth Amendment establishes an integrated bundle of rights that constitutes a larger right to an effective defense in our system of jurisprudence. *In re Oliver*, 333 U.S. 257, 272-73 (1948). These rights include the right to compulsory process, the right to reasonable notice of criminal charges, the right to be heard in court, the right to offer testimony, the right to counsel, and the right to examine adverse witnesses. *Id.* at 273.

The Confrontation Clause of the Sixth Amendment enshrines this latter right, providing that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In crafting this provision, the founding generation drew on English common law traditions. *Crawford v. Washington*, 541 U.S. 36, 43 (2004). These traditions emphasized the importance of "live testimony in court subject to adversarial testing" as the surest path to truth. *Id.*

Nevertheless, English officials at times deviated from this principle—abusing their powers to examine suspects and witnesses before trial and then reproduce the products of their examinations in court in lieu of live testimony. *Id.* The practice of pretrial examination became entrenched during the 16th-century reign of Queen Mary. *Id.* The use, and abuse, of pretrial examination came to a head during the notorious political trials of the 16th and 17th centuries. *Id.* at 44. Perhaps most infamous was the treason trial of Sir Walter Raleigh in 1603. Sir Walter Raleigh stood accused by his alleged accomplice, Lord Cobham, who implicated him in a letter and a private examination by the Crown's Privy Council. Sir Walter Raleigh demanded that the Court call his accuser before his face. He was denied. *Id.*

These abuses led to a series of statutory and judicial reforms that reinvigorated the ancient right to confrontation, including by developing "strict rules of unavailability, admitting examinations only if the witness was demonstrably unable to testify." *Id.* at 45. Despite this progress, controversial examination techniques remained in use, including in the American Colonies. *Id.* at 47. The Colonists protested British overreach in examining witnesses *ex parte*. *Id.* at 47-48. Thus, many states adopted declarations of rights around the time of the Revolution to preserve the right of confrontation. *Id.* at 48.

Mindful of this historical misuse of prosecutorial and investigative authority, the Framers drafted the Sixth Amendment as a powerful bulwark against

governmental abuse. It is thus unsurprising that this Court has long recognized that the Sixth Amendment right of confrontation "is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Barber v. Page*, 390 U.S. 719, 721 (1968). More than a century ago, this Court explained that the "primary object" of the Sixth Amendment's Confrontation Clause "was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness." *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

This Court has since "been zealous to protect [the right of confrontation] from erosion." *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959). This preserves the constitutional guarantee in a criminal case that evidence developed "against a defendant *shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel*." *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965) (emphasis added). The right to confront an adverse witness face-to-face in open court allows for a searching "personal examination" of the witness. This ensures that the jury can "look at [the witness] and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox*, 156 U.S. at 242-43.

However, this Court has also acknowledged that competing interests may in select circumstances weigh in favor of admitting out-of-court testimony. *See id.* at 243. In *Mattox*, the Court explained that "general rules of law of this kind [*i.e.*, the right to confront adverse witnesses in open court], however beneficent in their operation and valuable to the accused, must *occasionally* give way to considerations of public policy and the necessities of the case." *Id.* (emphasis added).

To balance the right of courtroom confrontation against the realities of trial, this Court cabined the exception to confrontation with a rule of necessity. Pursuant to this rule, the prosecution may use out-of-court testimonial evidence only if a witness is "unavailable" to appear in open court. And a witness is unavailable only if "the prosecutorial authorities have made a good-faith effort to obtain [the witness's] presence at trial." *Barber*, 390 U.S. at 724-25.

II. THE CURRENT GOOD FAITH STANDARD GOVERNING THE USE OF DEPOSITION TESTIMONY IN CRIMINAL TRIALS DOES NOT ADEQUATELY PROTECT THIS ESSENTIAL SIXTH AMENDMENT RIGHT.

As Petitioners rightly identify, the Eleventh Circuit's opinion highlights the deep division in the circuits on how to assess good faith to establish unavailability: some courts improperly permit the government to curtail its search for a trial witness because it already has that witness's deposition. That level of effort, acceptable in the Eleventh, Ninth, Eighth, and Fourth Circuits, would be rejected by courts in the

First, Tenth, Sixth, Third, and D.C. Circuits. *Compare United States v. Smith*, 928 F.3d 1215 (11th Cir. 2019), *and United States v. Yida*, 498 F.3d 945 (9th Cir. 2007), *and United States v. Johnson*, 108 F.3d 919 (8th Cir. 1997), *and United States v. Rivera*, 859 F.2d 1204 (4th Cir. 1988), *with Cook v. McKune*, 323 F.3d 825 (10th Cir. 2003), *and Brumley v. Wingard*, 269 F.3d 629 (6th Cir. 2001), *and McCandless v. Vaughn*, 172 F.3d 255 (3d Cir. 1999), *and United States v. Lynch*, 499 F.2d 1011 (D.C. Cir. 1974). The confusion in the application of the current good faith standard leaves defendants and the prosecution without clear guidance on when deposition testimony will be available at trial.

Moreover, absent a timely disclosure requirement, the current good faith standard threatens to erode essential fair trial rights and to undermine the basic protections enshrined in the Sixth Amendment. As this Court has recognized, "[w]here testimonial statements are involved," the Sixth Amendment's protections should not be left to vague rules, "much less to amorphous notions." *Crawford*, 541 U.S. at 601. Without clear guidance that "good faith" includes a process element of *timely disclosure*, the ambiguities inherent in the standard are ripe for abuse, creating a perverse incentive for prosecutors to gain a tactical advantage by relying on deposition testimony rather than bringing key witnesses to court.

The ambiguities inherent in the current standard exacerbate the risk of governmental overreach and threaten to swallow the rule of necessity. The

prosecution has an inherent advantage in structuring criminal trials, creating the potential for governmental abuse. As this Court has recognized, there is a latent danger in allowing state actors to engage in "formal, out-of-court interrogation of a witness to obtain evidence for trial." *Michigan v. Bryant*, 562 U.S. 344, 358 (2011). The opportunity to cross-examine a witness, which this Court has recognized as a pre-condition to admissibility, is a necessary but insufficient mechanism to mitigate the risk that the government will abuse its police powers. *See id.*

The right of confrontation encompasses more than the right of cross-examination, and thus the rule of necessity allows the government to forego producing a witness in court only where the witness has been previously cross-examined *and* the witness is unavailable. *See Crawford*, 541 U.S. at 57 ("Even where the defendant had such an opportunity [to adequately cross-examine a witness], we excluded the testimony where the government had not established the unavailability of the witness."). This is because "[t]he right to confrontation is basically a trial right. It includes *both* the opportunity to cross-examine *and the occasion for the jury to weigh the demeanor of the witness*." *Barber*, 390 U.S. at 725 (emphasis added). A deposition does not, and cannot, replace the rigor of cross-examination at trial, which requires witnesses to clarify inconsistencies in deposition testimony. Live cross-examination in front of the jury also provides an opportunity to challenge prior testimony using facts that have come to light since the deposition

and even through the course of the trial. For these reasons, the "right to immediate cross-examination . . . has always been regarded as the greatest safeguard of American trial procedure." *United States v. Inadi*, 475 U.S. 387, 410 (1986) (citation omitted).

Because the government has superior knowledge and ability to secure the trial attendance of witnesses, curtailment of defendants' Sixth Amendment Confrontation Clause right to in-court examination must be tempered by procedure that gives defendants sufficient ability to prepare for the inability to cross-examine a witness in front of the jury, or otherwise react in a meaningful manner. Any good faith effort to secure a witness's appearance at trial must include sufficient notice as a pre-condition to an assertion of good faith effort. The government does not operate in good faith, nor is it reasonable, when the prosecution is permitted to conceal its efforts and failures *and then* rely on deposition testimony at trial. It simply cannot have it both ways. Permitting that type of behavior undermines the rights to compulsory process and confrontation that the Sixth Amendment was meant to protect.

III. THIS COURT SHOULD GRANT *CERTIORARI* TO APPLY THE WELL-ESTABLISHED TIMELY DISCLOSURE JURISPRUDENCE UNDER *BRADY* TO ENHANCE THE CONFRONTATION CLAUSE'S AMBIGUOUS GOOD FAITH STANDARD.

The well-established timely disclosure requirements articulated by *Brady* and its progeny provide a helpful analog for clarifying procedural requirements of the good faith standard in a manner that will guarantee fair criminal trials. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("Society wins not only when the guilty are convicted but when criminal trials are fair . . . ."). Prosecutorial reliance on the current articulation of the good faith standard to *secretly* put minimal effort into finding an absent witness simply because an earlier deposition exists is "fundamentally at odds with the right of confrontation." *See Crawford*, 541 U.S. at 61. By adapting the rationale of the timely disclosure jurisprudence under *Brady*, this Court can provide a consistent and clear framework to guide prosecutors in the Confrontation Clause context and help all parties protect and uphold constitutional guarantees.

A. The Court's *Brady* Timeliness Jurisprudence is Particularly Illustrative in Light of the Similarities Between the Disclosure Requirement and the Right of Confrontation.

Like the right to confront adverse witnesses in open court, the *Brady* doctrine seeks to protect the right to a fair trial and works to defend against potential prosecutorial abuses.

First, both *Brady*'s disclosure requirement under the Fifth Amendment's Due Process Clause and the Sixth Amendment's Confrontation Clause establish fundamental constitutional safeguards essential to a fair trial. *See Pointer v. Texas*, 380 U.S. 400, 403-04 (1965) ("It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him."); *see also United States v. Bagley*, 473 U.S. 667, 675 (1985) (*Brady* disclosure obligation extends to information "that, if suppressed, would deprive the defendant of a fair trial.").

Second, both *Brady* and the bundle of rights included in the Sixth Amendment recognize the prosecution's inherent advantages in the criminal trial context, where the defense must rely on the prosecution for information uniquely in the government's control. In the case of *Brady* material, the defense relies on the prosecution to disclose all favorable evidence that "is material either to guilt or to punishment." *Brady*, 373 U.S. at 87. Likewise, in the case of deposition testimony, the defense may have to forego the right to courtroom confrontation where a witness is likely to be unavailable. But, in so doing, the defense relies on the prosecution's good faith effort to obtain the witness's presence at trial despite the availability of the out-of-court deposition. *See Barber*, 390 U.S. at 724-25. As with exculpatory evidence, however, the informational imbalance requires that prosecutors provide

defendants adequate notice about a witness's unavailability such that a defendant can make use of that information to prepare a defense.

B. *Brady*'s Timely Disclosure Requirement Provides a Critical Metric for Assessing Good Faith Under the Confrontation Clause.

It is well-settled that prosecutors must disclose *Brady* material with sufficient time for the defense to make effective use of the information. *See Calderón*, 578 F.3d at 93. "[T]he longer the prosecution withholds information, or (more particularly) the closer to trial the disclosure is made," the less opportunity the defense has to make use of *Brady* information. *Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001). Timely disclosure is imperative to protect defendants' fair trial guarantees because "new witnesses or developments tend to throw existing strategies and preparation into disarray." *Id.* at 101. Thus, *Brady* clarifies that "[t]he opportunity for use" means an "opportunity for a responsible lawyer to use the information with some degree of calculation and forethought." *Id.* at 103.

This rationale applies to using depositions of unavailable witnesses at trial. The Confrontation Clause "must be interpreted in a manner sensitive to its purpose and to the necessities of trial and the adversary process." *Maryland v. Craig*, 497 U.S. 836, 837 (1990). Here, the government notified Petitioners of its failure to find its material witness *after* trial started and *the day before* the witness was set to testify. *See* Pet. App. at 12a-14a. In these circumstances, Petitioners could not "use the

information with some degree of calculation and forethought," especially because they learned this critical information "in the midst of the pressures and paranoias of trial." *Leka*, 257 F.3d at 103.

By keeping its failures a secret, the government did not act reasonably or in good faith. As is the case with belatedly dumping potentially exculpatory information on a defendant, notifying Petitioners here that a witness was unavailable after trial started does not meet constitutional muster. A good faith effort to locate a missing witness should include a requirement that prosecutors notify Petitioners of the witness's potential absence in a timely manner. This simple process enhancement to the good faith requirement would place little burden on the prosecution, and in no way disrupt necessary government proceedings. But it would have enabled Petitioners to use this information to prepare and present their case. For example, Petitioners might have moved the trial court to order additional actions to find the witness, undertaken independent efforts to locate her, or exercised other Sixth Amendment rights, such as compulsory process to secure additional witnesses to counter the unavailable witness's deposition testimony. Instead, because the government failed to inform Petitioners in a timely manner, all these possibilities were needlessly hindered.

C. Clarifying the Good Faith Standard to Include a Timely Notice Requirement Would Strengthen the Protections the Confrontation Clause was Meant to Ensure.

In this case, the marshals had already mistakenly released the material witness when the court set trial. *See* Pet. App. at 122a, 150a. The prosecution learned that its material witness was missing nearly two months before trial. *Id.* at 167a. Once the prosecution learned the witness was missing, it clearly should have taken additional steps to find her, but the current standard encourages prosecutors to do less. Thus, here, the prosecution waited until the eve of trial to make a last-ditch, half-hearted attempt to locate the witness through a minimal number of calls and text messages to her boyfriend. *Id.* at 129a-131a. And the prosecution believed it was permissible to engage in this *pro forma* effort because it did not have, under current Confrontation Clause jurisprudence, an obligation to notify the defense of the status of this search, or its intent to use the deposition testimony, prior to trial. "It is difficult to believe that the State would have been so derelict in attempting to secure the witness' presence at trial had it not had her favorable [deposition] testimony upon which to rely in the event of her 'unavailability.'" *Ohio v. Roberts*, 448 U.S. 56, 79-80 (Brennan, J. dissenting), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004). "The right of confrontation may not be dispensed with so lightly." *Id.* s

The deficiencies in the current understanding of the good faith test have allowed the Eleventh, Ninth, Eighth, and Fourth Circuits to find that the government is permitted to put less effort into locating a witness for trial if prior deposition testimony is available. *See Smith*, 928 F.3d 1215; *see also Yida*, 498 F.3d 945; *Johnson*, 108 F.3d 919; *Rivera*, 859 F.2d 1204. In other words, a reasonable effort requires less exertion if the government has already deposed the witness. This position encourages prosecutors to engage in "formal, out-of-court" depositions "to obtain evidence for trial," and then put only minimal effort into subsequently locating deposed witnesses to avoid having a deponent appear in open court, thereby preventing a defendant from cross-examining the witness in front of the jury. *See Bryant*, 562 U.S. at 358. If the government need not even take the simple step of running a name through a law-enforcement database to locate a witness merely because the witness was previously deposed, the government has significant incentive to replace live witness testimony with a pre-recorded deposition whenever possible.

A requirement that the government timely notify defendants of the status of its efforts will act as a governing mechanism on this perverse incentive—encouraged by the inconsistent applications of the current rule—to minimize efforts to locate "unavailable" witnesses. It will do so in two ways. *First*, a timely notice requirement will permit defendants to react to that information in their trial

preparation, thus lessening the tactical advantage of late notice. *Second*, it will give trial courts the opportunity to better administer their cases. They will be able to avoid unfair surprises, like here, where the government's last-minute notice put the trial court in the unenviable position of having to balance limiting Petitioners' Confrontation Clause rights with upsetting a jury trial that was already under way. Forcing trial courts to make such a decision necessarily favors the prosecution, as prosecutors and courts can, and do, rely upon the current good faith standard unbound by any notice requirement.

It does not appear that courts have paid much attention to the procedural element of the Confrontation Clause rights or focused on how much notice the government affords defendants when it cannot find a witness. *See, e.g.*, *Hardy v. Cross*, 565 U.S. 65 (2011); *Crawford*, 541 U.S. 36; *Roberts*, 448 U.S. 56; *Barber*, 390 U.S. 719; *United States v. Siddiqui*, 235 F.3d 1318 (11th Cir. 2000). Yet by simply insisting that prosecutors make a timely disclosure of a witness's potential absence, the Court can refocus the lower courts and ensure that prosecutors are not tempted to make insufficient efforts to locate a witness knowing that they can rely on deposition testimony in lieu of live examination. This clarified requirement will better safeguard bedrock constitutional fair trial guarantees as the Framers intended, while still acknowledging "considerations of public policy and the necessities of the case," as the rule of necessity envisions. *Mattox*, 156 U.S. at 243.

Importantly, adopting *Brady*'s timely notice requirement in the Confrontation Clause context will also preserve the delicate balance between the rights of the defense and the government's ability to effectively prosecute a case established by the rule of necessity. The Court's imposition of a timely notice obligation—one that the government can readily satisfy—would enhance the good faith standard and preserve the Sixth Amendment as the Founders intended.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KEVIN B. MUHLENDORF
Counsel of Record
BERT W. REIN
TATIANA SAINATI
MICHELLE B. BRADSHAW
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
202.719.7000
kmuhlendorf@wileyrein.com

Counsel of Record for Amicus Curiae
The Constitution Project at the
Project On Government Oversight