UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant*,	:	
	:	No.: 17-1991
v.	:	
	:	DEATH PENALTY CASE
DONALD FELL, *Defendant-Appellee*	:	

BRIEF OF *AMICI CURIAE* DEATH PENALTY COMMITTEE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae the Death Penalty Committee of the National Association of Criminal Defense Lawyers ("NACDL") submits this brief as part of its work with the larger organization. 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 approximately 40,000 affiliate members from all 50 states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its 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

[1] Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, undersigned avers that no counsel's party authored the brief in whole or in part, that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and that no person other than counsel for *amicus curiae* contributed money that was intended to fund preparing or submitting this brief. On October 11, 2017 counsel for each party indicated consent to filing of a brief on behalf of NACDL. CACJ is an additional *amicus* that, in light of the compressed briefing schedule, has not yet obtained the consent of the parties.

judicial process. As such, NACDL is well positioned to assist this Court with the recurring and important issues arising from the question implicated in this case.

California Attorneys for Criminal Justice ("CACJ") is one of the two largest statewide organizations of criminal defense lawyers associated with the National Association of Criminal Defense Lawyers. CACJ has as part of its bylaws "the defense of the rights of persons as guaranteed by the United States Constitution." CACJ often appears with NACDL as an *amicus curiae* in cases of significance to its membership. Because California based criminal defense lawyers regularly defend capital cases charged either by Federal or State authorities, this matter is of significance to CACJ. One of Appellee Donald Fell's lawyers is a CACJ member. Issues framed in this case have arisen in California based capital case litigation. All of these matters explain CACJ's interest(s).

SUMMARY OF THE ARGUMENT

The Confrontation Clause applies with equal force to the sentencing proceedings at issue in Donald Fell's case as it does to any other phase of a capital trial.

ARGUMENT

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The right of confrontation is deeply ingrained in the fabric of our system of laws, particularly in

the context of capital punishment. It is a protection that predates even the origins of common law: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have license to answer for himself concerning the crime laid against him." *Greene v. McElroy*, 360 U.S. 474, 496 n.25 (1959) (quoting Acts 25:16). The right of confrontation applies with greatest force to "core testimonial statements," such as the statements at issue here. *Crawford v. Washington*, 541 U.S. 36, 63 (2004).

Allowing the admission of un-confronted testimonial statements runs counter to the value of reliability which is supposed to lie at the core of the capital sentencing proceeding.

THE CONFRONTATION CLAUSE GREW OUT OF THE COMMON LAW RIGHT OF CONFRONTATION WHICH EXISTED AT THE TIME OF OUR NATION'S FOUNDING, SUBJECT ONLY TO THOSE EXCEPTIONS EXISTING AT THAT TIME.

Perhaps more than any other constitutional protection, the scope of the Confrontation Clause protections is informed by the framer's intent.[2] Finding the text of the clause vague, Justice Scalia's opinion in *Crawford* excavates at length the founder's views about its meaning. 541 U.S. at 42-50. And, as *Crawford* makes

[2] The Government agrees that the frame of reference is "the right of confrontation at common law, admitting only those exceptions established at the time of founding." Gov't Br. 20 (quoting *Crawford*, 541 U.S. at 54).

clear, the common law practices that informed the framers as they drafted the Clause are of particular relevance to understanding its scope.

A. The Common Law Right to Confront Witnesses Applied to All Stages of Trial.

The right of confrontation enshrined at common law applied at all stages of *trial*, *Crawford*, 541 U.S. at 68, including capital trials, whose results hinged on facts that would make a prisoner eligible for execution. This is evident in the history of England's common-law trials, and those taking place in the United States before and after the Sixth Amendment was adopted, as laid out in Scalia's *Crawford* majority opinion.

Justice Scalia traces the enshrinement of the common law confrontation right to the early Seventeenth Century trial and execution of Sir Walter Raleigh for treason by the British Crown. *Id*. at 44. At Raleigh's treason trial, the Crown admitted against him, over his repeated objection, a letter and a prior (non-confronted) examination of his alleged accomplice, Lord Cobham. *Id.* "Raleigh demanded that the judges call him to appear, arguing that '[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face . . . .'" *Id.* (internal citations omitted). The judges, however, overruled the objection. The jury convicted. And Raleigh was executed. *Id.* "One of Raleigh's trial judges later lamented that 'the justice of England has never been

so degraded and injured as by the condemnation of Sir Walter Raleigh.'" *Id.* (internal citations omitted).

Raleigh's case served as Justice Scalia's paradigmatic example of a confrontation violation, and the "principal evil at which the Confrontation Clause was directed." *Crawford*, 541 U.S. at 50. Indeed, after the Raleigh debacle, one of the first reforms in English common-law was to require an early form of confrontation in cases of treason, the quintessential capital crime. *Id.* at 44 (noting that new "treason statutes required witnesses to confront the accused 'face to face' at his arraignment," and citing 13 Car. 2, c. 1, § 5 (1661)).

Shifting focus to the era in which the confrontation protection had been recently adopted as part of the Sixth Amendment, *Crawford* also cited to early decisions in which the protection had been upheld as evidence of its enshrinement in common law. *See, e.g., id.* at 49-50 (discussing *State v. Campbell*, 30 S.C.L. 124, 1844 WL 2558 (App. L. 1844). *Campbell* was a death-penalty appeal, arising after a unitary murder trial. Reversing the conviction and death sentence of a man whose confrontation right was violated, South Carolina's highest law court emphasized the singular importance of the confrontation right in protecting a person on trial for his or her life:

> The primary principle upon which so strict a rule of law rests, is this – no *court can take the life of a man*, but by the conviction of the accused, effected in the due course of law; that is, in this instance, by the trial by jury. . . .

> And one of the indispensable conditions of such due course of law is, that prosecutions be carried on to the conviction of the accused, by witnesses confronted by him, and subjected to his personal examination.

Id. at 125 (emphasis added); *see also id.* at 131-32 ("I cannot conceive how judges could have resolved, that the depositions of deceased witnesses, when examined by the coroner, should be received as competent evidence at the final trial of life and death-but by assuming that the written testimony had been taken under all the guards and tests of the common law, and especially those of the cross-examination.").

The Framers had no notion of a trial for a person's life at which the accused could be condemned upon non-confronted, testimonial hearsay.

B. There Are Only Two Established Founding Era Exceptions to the Confrontation Right

Just as the scope of the Confrontation Clause protection is strongly informed by the practices at the founding, the exceptions to it are also limited "to those exceptions established at the time of founding." *Crawford*, 541 U.S. at 68. There were only two forms of testimonial hearsay admissible at common law: dying declarations and forfeiture by wrongdoing. *See Giles v. California*, 554 U.S. 353, 358-59 (2008).

Dying declarations are statements "made by a speaker who was both on the brink of death and aware that he was dying." *Id.* at 358. Forfeiture by wrongdoing

refers to a defendant causing the absence of a witness with an intention "to prevent a witness from testifying." *Id.* at 361. Neither exception is at issue in this case, as is undisputed by the Government.

AT THE FOUNDING AND THROUGH THE MIDDLE OF LAST CENTURY, CAPITAL TRIALS AND SENTENCING PROCEEDINGS WERE A UNITARY PROCEEDING.

A. At the Founding, Capital Trials – and Capital Juries – Rendered Sentencing Decisions in Unitary Proceedings.

As early as the thirteenth century, traditional jury trials determined who would live and who would die. Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800* 28-64 (1985);[3] *see also* Jeffrey Abramson, *We, The Jury: The Jury System and the Ideal of Democracy* 217 (Basic Books 1994) (citing Green); *cf. Jones v. United States*, 526 U.S. 227, 246 (1999) (citing Green's work); *Walton v. Arizona*, 497 U.S. 639, 711 n.3 (1990) (Stevens, J., dissenting) (citing Green's work), *overruled by Ring v. Arizona*, 536 U.S. 584, 589 (2002).

Their "power to determine the defendant's fate was virtually absolute." Green, *supra,* at 19. Those acquitted were released. *Id.* "The guilty were hanged almost immediately." *Id.* Indeed, the judgment of conviction was termed

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[3] *See also* Thomas Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 Mich. L. Rev. 413 (1976). For clarification, cites to "Green," *supra*, continue to refer to Green's book, while subsequent cites to this article will employ its short form.

"'*suspendatus est*,' ('he is hanged.')." Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 Mich. L. Rev. at 424. In these trials, juries in effect were deciding the "appropriate circumstances under which a person's life might be surrendered to the Crown." *Green, supra,* at 20; s*ee also Apprendi v. New Jersey*, 530 U.S. 466, 479-80 (2000) (showing that laws "prescrib[ing] a particular sentence for each offense" limited authority of English judges).

One of the tools available in the trials of the Middle Ages was a jury verdict that a homicide was committed in self-defense, which became a powerful means of saving the accused given that era's lack of gradations of homicide. Green, *The Jury and the English Law of Homicide*, 1200-1600, 74 Mich. L. Rev. at 415, 427-36. Examining the ancient verdicts, Green found that "the frequent recourse to such findings resulted mainly from the jury's desire to save the lives of defendants who had committed simple homicide." *Id.* at 431. The juries did so to limit homicide convictions to the "most culpable homicides." *Id*. at 432. *see also id.* at 416 (finding "the local community considered" execution "appropriate mainly for the real evildoer: the stealthy slayer who took his victim by surprise and without provocation")

When the founders adopted the Bill of Rights, a verdict of guilty was tantamount in most instances to the rendering of a sentence. "[T]he English trial judge of the later eighteenth century had very little explicit discretion in

sentencing. The substantive criminal law . . . prescribed a particular sentence for each offense." John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution, in The Trial Jury in England, France, Germany 1700-1900* at 36 (Antonio Padoa Schioppa, ed., 1987). For many crimes, that sentence was death: "It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than a hundred and sixty have been declared by act of parliament to be felonies without benefit of clergy; or, in other words, to be worthy of instant death." 4 William Blackstone, Commentaries on the Laws of England 18 (Univ. of Chicago Press 1979) (1769).

In Colonial America, the criminal law was similarly severe, with some variations: most Northern colonies enacted criminal codes that were more lenient for property crimes and harsher for crimes against morality, and Southern colonies simply adopted the laws of England. Stuart Banner, *The Death Penalty: An American History* 6-8 (2002) [hereinafter Banner, *The Death Penalty*]. In all these capital cases, the jury's determination of guilt was also, by definition, the determination of the sentence.

"Executing a fellow human being," however, "was just as momentous in the seventeenth and eighteenth century as it is today." Banner, *The Death Penalty* at 5. Juries accordingly chafed against mandatory death sentences and devised ways to avoid their imposition. In England, "juries would downcharge or downvalue goods

in order to defeat the death penalty (Blackstone's 'pious perjury')." John H. Langbein, *The Origins of Adversary Criminal Trial* 334-35 (2003) (footnote omitted) [hereinafter Langbein, *Origins*].

For example, unemployed weaver Frederick Usop was charged with theft of property worth twenty-eight shillings and put on no defense—but the jury found him guilty of stealing four shillings of goods, thus sparing his life. Langbein, *Origins* at 336 n.396. Judges also reacted to draconian mandatory death sentences by developing broad doctrines—such as the exclusionary rule and the beyond-a-reasonable-doubt standard of proof—that "assured that not only some innocent defendants would be spared, but also many culpable ones." Langbein, *Origins* at 335-36.

These practices were not limited to England. "In the decades surrounding the American Revolution, the practice of juries issuing partial verdicts or downvaluing stolen goods in order to avoid death sentences was widespread[.]" John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 Colum. L. Rev. 1967, 2013 (2005). Indeed, because "[o]nly a small fraction of eighteenth-century criminal trials were genuinely contested inquiries into guilt or innocence[,] . . . to the extent that trial had a function in such cases beyond formalizing the inevitable conclusion of guilt, it was to decide the sanction." Langbein, *Origins* at 59. By exercising their authority to find facts that precluded

imposition of the death penalty, these juries were exercising obvious sentencing power, especially where their choices flew in the face of the evidence presented at trial.

"At least since the Revolution, American jurors have, with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict." *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976). The jury's role as capital sentence was thus clear, even in the context of mandatory penalties, at the time of the Founding. Douglass, *Confronting Death* at 2014.

The issue of jury nullification for capital offenses was debated during the passage of the United States' first criminal legislation. *Id.* Yet the First Congress maintained the system of mandatory sentences for capital convictions even while it granted judges sentencing discretion for noncapital offenses. The Act of April 30, 1790 provided for seven crimes with mandatory death penalties, and thirteen non-capital crimes that were subject to fines and or terms of imprisonment. *Id.* at 2017 & nn.286-87. "Most critically, the criminal legislation of the First Congress created no crimes for which a judge might choose between life and death[.]" *Id.* at 2017 n.290. These choices make clear the Founders intended that the capital trial be a unitary proceeding not subject to judicial discretion. "[T]he question of guilt for a capital crime and the question of death remained inseparable. And [the Founders]

left both questions to juries in the context of a trial featuring full adversarial rights." *Id.* at 2018.

This conscious design demonstrates that the Founders understood the Confrontation Clause as an essential bulwark not just against wrongful convictions but against wrongful sentences of death. In a capital prosecution, trial before the jury encompassed sentencing—and thus all proceedings on the path to death were subject to the protections of both the Confrontation Clause and the moral authority of the jury. A capital trial without the right to cross-examination throughout, like the one proposed by the Government, would not have occurred at the Founding.

B. Last Century's Bifurcation of Capital Trials Must not Diminish the Confrontation Right

In 1957, California became the first U.S. jurisdiction to require bifurcated capital trials, providing for separate phases for guilt/innocence and sentencing determinations. *See* Act of Sept. 11, 1957, 1957 Cal. Stat. 1968 (replaced by Cal. Penal Code § 190.1 (1973)). By 1970, only five other states had followed suit. *See McGautha v. California*, 402 U.S. 183, 208 & n.19 (1971) (collecting statutes). But bifurcation became the norm after *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). A year before *Furman*, the Court had held that due process permitted standardless sentencing in capital cases and that it did not require capital trials to be split between guilt/innocence and sentencing phases. *McGautha*, 402 U.S. at 185. But the next year, in a dramatic about-face, the Court in *Furman* ruled that

capital sentencing statutes must limit the death penalty to only the worst-of-the-worst defendants. *Furman*, 408 U.S. at 239. That decision invalidated every then-existing capital sentencing statute.

Although the *Furman* decision was fractured in the extreme – consisting of nine separate opinions – the Court's later cases would make it clear that the predominant concern animating its decision was the potential for arbitrary factors to influence capital sentencing decisions absent a procedurally robust means for identifying who should be eligible for the ultimate punishment. *See* Sam Kamin & Justin Marceau, *Waking the Furman Giant*, 48 UC Davis L. Rev. 981, 989 (2015).

Furman "touched off the biggest flurry of capital punishment legislation the nation had ever had." Banner, *The Death Penalty* at 267 (2002). After *Furman*, capital sentencing trials had to be individualized, providing the sentencer with information about the defendant's "character and individual circumstances," information that "may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair administration of that question." *Gregg v. Georgia*, 428 U.S. 153, 190 (1976). In light of this tension, the Court concluded that bifurcation of the guilt/innocence and sentencing questions would comply with the requirements of the Eighth Amendment. *Id.* at 191-92. And so, in the second half of last century it quickly became the universal norm for capital sentencing

schemes, including the federal death penalty statute, to provide for bifurcated proceedings. 18 U.S.C. §§ 3591 *et seq*.

The sentencing schemes in these bifurcated proceedings, like those at the founding, almost universally rely upon jury fact finding and sentencing in order to impose a sentence of death. *Cf. Ring*, 536 U.S. at 608 ("[T]he superiority of judicial factfinding in capital cases is far from evident. . . . [T]he great majority of States responded to this Court's Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to the jury."). However, these same schemes, created to improve reliability of capital trials, have inadvertently led to the potential deprivation of deeply rooted Sixth Amendment confrontation rights, by allowing hearsay statements to be offered in support of a sentence of death. This outcome runs counter to the purpose of bifurcating capital cases in the first place: to improve reliability—a value that runs to the very heart of the confrontation guarantee. *See Crawford*, 541 U.S. at 61 ("To be sure, the Clause's goal is to ensure reliability . . . .").

The Government's reliance on *Williams v. New York*, 337 U.S. 241 (1949) is misplaced. Modern Sixth Amendment decisions, and historians' current understanding of the Confrontation Clause's development, make clear that

Williams cannot support excluding Confrontation Clause protection at sentencing proceedings.

Williams, a capital case, was decided under the Due Process clause, before the Confrontation Clause was incorporated against the States (which did not occur until 1965. *See Pointer v. Texas*, 380 U.S. 400, 404 (1965) (incorporating confrontation guarantee)). The trial judge in *Williams* had imposed a death sentence despite a jury recommendation of life. 337 U.S. at 242. The majority's decision does not dwell upon the evidence in question, but the dissent explains "the judge exercised his discretion to deprive a man of his life, in reliance on material made available to him in a probation report, consisting almost entirely of evidence that would have been inadmissible at trial. . . . Much was incompetent as hearsay. All was damaging, none was subject to scrutiny by the defendant." *Id.* at 253 (Murphy, J., dissenting).

The Court in *Williams* nevertheless upheld the death sentence based upon the supposed leeway historically given to judges at sentencing:

> But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.

Id. at 246 (footnotes omitted).

The court below avoids the incongruity of providing reliability via bifurcation but at the cost of confrontation. The district court's holding is in keeping with what the founders would have expected in light of the practice of jury sentencing in capital cases. In light of that practice – and the lack of any relevant exception – it is no surprise that the lower court found the Confrontation Clause's guarantee of reliability to necessarily extend to capital sentencing proceedings.

IF THIS COURT REACHES THE ISSUE, IT SHOULD HOLD THAT THE CONFRONTATION CLAUSE'S MECHANISM FOR ENSURING RELIABLITY APPLIES AT CAPITAL SENTENCING PROCEEDINGS

The Respondent has offered several alternative grounds, including non-constitutional grounds, for affirmance. Thus, this Court may ultimately may avoid the constitutional questions surrounding the application of the Confrontation Clause to the sentencing decision. However, if this Court reaches the issue, it should hold that, consistent with founding era expectations, the Confrontation Clause applies to all stages of the trial. It should also only allow for the admission of any testimonial statements by Mr. Lee if they are dying declarations or if Mr. Lee's unavailability was somehow connected to a purposeful action by Mr. Fell, something the Government has not demonstrated.

Because the statements are under seal, *Amici* are unable to substantively comment on them. However, the public record indicates they were made by an alleged accomplice and after his arrest. At least some of the statements were made

during interrogations and are, therefore, plainly "core testimonial statements." *Crawford*, 541 U.S. at 63. An important consideration for the remaining statements is that Mr. Fell's alleged accomplice made them. Any characterizations of Mr. Fell's role in the offense should be looked at with great suspicion, given Lee's obvious interest in minimizing his own culpability. Regardless of whether those statements are "core" testimonial hearsay, the value of reliability, as ensured by Mr. Fell's right to confront them, should inform this Court's assessment of their admissibility. In the context of a capital trial, the original understanding of the right to confront witnesses requires its application.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's ruling.

Respectfully submitted,

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October 12, 2017

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2017, the foregoing was filed electronically with the Clerk of the Court using the CM/ECF system. Notice of this filing and its viewing and downloading are thereby provided to all counsel of record by cooperation of the CM/ECF system.

I further certify that (1) this Brief was prepared in 14-point Times New Roman font using Microsoft Word software, (2) this Brief consists of 3,693 words, excluding the parts of the Brief exempted by the rules of the court, and (3) this Brief and has been scanned for viruses and the Brief is virus-free.

s/John R. Mills
JOHN R. MILLS