No. 18-8862

In The

Supreme Court of the United States

RODERICK WHITE,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of Louisiana, First Circuit

BRIEF OF FERN AND CHARLES NESSON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

FERN L. NESSON
Counsel of Record
1525 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4609
fernlnesson@gmail.com

CHARLES R. NESSON
1525 Massachusetts Ave.
Cambridge, MA 02138
nesson@law.harvard.edu

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Charles Rothwell Nesson, Weld Professor of Law, Harvard Law School, is professor of Fair Trial, Jury Law and Evidence at Harvard Law School, Founder of the Berkman-Klein Center for Internet & Society at Harvard University, and law clerk to Justice John Marshall Harlan.

Fern L. Nesson, is a lawyer, historian, teacher, and artist. We speak as members of the Supreme Court bar and friends of the Court with no conflict of interest.

SUMMARY OF THE ARGUMENT

Generations of judges have struggled unsuccessfully to articulate a coherent constitutional confrontation rule. Bound by a hearsay misconception, they naturally turned to Wigmore and his students for guidance. Big mistake! In 1973, Justice Harlan described the problem:

> *If "confrontation" is to be equated with the right to cross-examine, it would transplant the ganglia of hearsay rules and their exceptions*

---

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

> *into the body of constitutional protections.* The stultifying effect of such a course upon this aspect of the law of evidence in both state and federal systems need hardly be labored.[2] (emphasis added)

Ohio v. Roberts, 448 U.S. 56 (1980), did just such a transplant, *incorporating* into the Confrontation Clause all traditional hearsay exceptions and all future hearsay exceptions that might subsequently come to be recognized as reasonable. *Crawford v. Washington*, 542 U.S. 36 (2004), overruled *Roberts* but continued its hearsay misconception, adopting the 'testimonial' hearsay approach of evidence professors Richard Friedman and Jeffrey Fisher.[3]

Represented by this very team, Petitioner asks the Court to "clarify the governing doctrine" yet again.[4] Another clarification of *Crawford* is beside the point. Instead, this Court should start fresh. It is time to end the error that results from confusing hearsay admissibility with confrontation.[5]

---

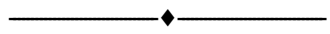
[2] *California v. Green*, 399 U.S. 149, 173 (1970). Harlan's concern went unnoted in *Green* and Harlan himself failed to solve the challenge of disentangling confrontation from hearsay. *Dutton v. Evans*, 400 U.S. 74, 95 (1970).

[3] *Crawford v. Washington*, 542 U.S. 36 (2004); Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L.J. 101 (1998)

[4] *White v. Louisiana*, No. 18-8862, Brief of Richard D. Friedman as *amicus curiae*, p8.

[5] *Stuart v. Alabama*, 586 U.S. ___ (2019).

We urge the Court to take this case but to do so in order to overrule *Crawford*. The constitutional right to "be confronted with" a witness is not a hearsay rule. It is a fundamental procedural building block of fair jury trial guaranteeing that defendants be convicted only upon sufficient evidence. Overruling *Crawford* and replacing it with a proper judicial understanding of the Sixth Amendment will rationalize confrontation law and restore the centrality of jury process to American criminal justice.



ARGUMENT

The Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This right to be confronted with proof by sworn witness at trial was claimed eloquently by Sir Walter Raleigh at his trial for treason in 1603. What precisely was the injustice done to Raleigh? On what legal claim did he stand? Consider Raleigh's claim in his own words.

> RALEIGH: Prove me guilty of these things by one witness only, and I will confess the indictment. [6] . . .
>
> I beseech you, my lords, let Cobham be sent for; let him be charged upon his soul, upon his allegiance to the King, and if he will

[6] Jardine, Criminal Trials (1832) 420.

> then maintain his accusation to my face, I will confess myself guilty.[7]
>
> . . .
>
> Good my lords, let my accuser come face to face and be deposed. Were the case but for a small copyhold, you would have witnesses or good proof to lead the jury to a verdict; and I am here for my life![8]
>
> . . .
>
> Let my Lord Cobham speak before God and the king, and deny God and the king if he speak not truly, and will then say that ever I knew of Arabella's matter, or the money out of Spain, or the surprising treason, I will put myself upon it. God's will and the king's be done with me![9]
>
> . . .
>
> I appeal to God and the king in this point, whether Cobham's accusation be sufficient to condemn me.[10]

Raleigh was demanding direct proof by a live witness who stood behind his accusation. Raleigh's issue was the insufficiency of the proof against him by reason of prosecution failure to produce even a single witness who testified from personal knowledge about

---

[7] *Ibid*.

[8] *Id*. at 427

[9] *Id*. at 435

[10] *Id*. at 443

Raleigh's alleged treason.[11] Cross-examination was never the issue at Raleigh's trial. Had Cobham been produced and stated his accusation to the jury in direct testimony, Raleigh's claim would have been met.

Constitutional confrontation requires legal sufficiency of proof. It is not a rule about the admissibility of hearsay evidence. Judges sit to assure that the prosecution has met this requirement before submitting the defendant to a jury verdict. The right to have sufficient proof by live witness is fundamental to a fair jury trial. It protects not only the defendant from proof by "Spanish inquisition" but the jury, ensuring that it has sufficient evidence upon which to reach a verdict.[12]

From its first opportunity to interpret the Confrontation Clause, this Court has confused confrontation with hearsay law. In *Mattox v. United States*, 156 U.S. 237 (1895), the first confrontation case to come before the Court, the Court approved the conviction of a defendant in the absence of direct testimony from any live witness to the crime[13]. Instead, transcripts of two witnesses' testimony at a prior trial were read to the jury. Affirming the conviction, the *Mattox* Court misread the clear mandate of the Confrontation Clause in three ways.

---

[11] Chief Justice Popham ruled, *id.* at 427: "Where no circumstances do concur to make a matter probable, then an accuser may be heard; but so many circumstances agreeing and confirming the accusation in this case, the accuser is not to be produced."

[12] Jardine, *supra* note 5, at 418.

[13] *Mattox v. United States*, 156 U.S. 237 (1895).

First, the Court framed the issue before it in terms of hearsay admissibility: "*Error in . . . admitting* to the jury the reporter's notes of the testimony of two witnesses at the former trial, who had since died."[14] Ask the wrong question, get the wrong answer. Admissibility rulings on specific items of evidence do not resolve the confrontation issue. Confrontation requires evaluation of the whole body of evidence. Raleigh was not making an admissibility objection.

Second, the *Mattox* Court created an exception to the Confrontation Clause by analogizing the prior trial transcripts to dying declarations. In the Court's view, the admissibility of dying declarations in murder cases opened the clause up to exceptions like prior cross-examined testimony.

If such declarations are admitted, because made by a person then dead, under circumstances which give his statements the same weight as if made under oath, *there is equal if not greater reason for admitting testimony of his statements which were made under oath* (emphasis added).[15]

But *admissibility* of evidence was not the issue. Under hearsay rules, both dying declarations and transcripts of prior recorded testimony are admissible. The problem was one of sufficiency: should prior recorded testimony suffice as the only proof of the identity of the

---

[14] *Id.* at 238.

[15] *Id*. at 244.

defendant? Creating hearsay exceptions to confrontation based upon analogy to dying declarations fails to appreciate the solemnity of the dying declaration. Compared to a witness who speaks on oath in court, a dying declarant speaks in face of eternal judgment in the court of god. Oath administered in a court of law invokes this solemnity in pale substitute, not the other way round.[16]

Third, *Mattox* preferenced "necessity" over the Constitutional text.[17] "[G]eneral rules of law of this kind, 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." Judicial surrender of constitutional rights to necessities of state completely misses the point of constitutional constraint.[18]

Mattox's entanglement of constitutional confrontation with the ganglia of hearsay exceptions bedevils confrontation law to this day. When *Pointer v. Texas*, 375 S.W.2d 293 (1963), held that "the Sixth Amendment's right of an accused *to confront the witnesses against him* [sic] is made obligatory on the states by the Fourteenth Amendment," this problem came squarely into focus: Does the clause mean that no hearsay evidence can be introduced against a criminal

---

[16] Howard Smith, Dying Declarations, 3 Wis. L.Rev 193, 203 (1925); George Fisher, The Jury's Rise as Lie Detector, 107 Yale L.J. 575 (1997).

[17] *Mattox v. United States*, *supra* note 12, at 243.

[18] Wigmore fully concurs: Wigmore, Treatise on Evidence, (2nd ed. 1923) sec 1397, The Right of Confrontation, at 100.

defendant unless there is a constitutional exception? Must every exception to the hearsay rule be litigated and constitutionally justified?

While Roberts surrendered constitutionality to all reasonable hearsay exceptions, *Crawford* attempted to compress them all into one exception. Justice Scalia ignored the actual text of the clause, transforming its language from a right to "be confronted with" into a right "to confront." He mischaracterized Raleigh's cry for justice both in its language and its substance: "the judges *refused to allow Raleigh to confront* Cobham in court, where he could cross-examine him and try to expose his accusation as a lie."[19]

Instead of focusing on the verb phrase driving the clause, Justice Scalia focused on "witnesses against," taking the phrase out of context both within the sentence and within the amendment as a whole. The Sixth Amendment deals with fundamental criminal procedure – just as the Seventh Amendment deals with the structure of a civil trial. The amendment deals with the production of witnesses, empowering the jury to hear witnesses for both sides. It does not deal with the admissibility of evidence.

Even when analyzing "witnesses against," Justice Scalia strayed far from the import of the text. Rather than considering the function of the clause and its context within the amendment, he looked for meaning to *Webster's Dictionary* (1825), using its definition of

---

[19] Crawford, *supra* note 2, at 44.

"witness" to transform Raleigh's confrontation right into a constitutionalized hearsay rule. Justice Scalia needed no recourse to Webster. The meaning of "witnesses agains" follows logically from the text and function of the rule: "witnesses against" are those who offer live direct, non-hearsay testimony sufficient to convict. The Confrontation Clause is a rule of production, not a hearsay admissibility rule.

Crawford's misbegotten reframing of the confrontation right to "be confronted with" to be a "testimonial" hearsay rule protecting a right "to confront" is most profoundly a failure to appreciate and support the jury's function in criminal trials.

Confrontation enables the jury to do its job. Determining whether there is evidence sufficient on the record for the jury to convict is the most fundamental responsibility of an American trial judge and the most fundamental protection of human liberty advanced by American jury trial.

CONCLUSION

On the fact of this case, Petitioner White was denied his Sixth Amendment right to **be confronted with** a live witness sufficient to prove the charge against him. The Court should take this case, not only

to enforce White's rights, but to fix the problem at its root. Overrule *Crawford*.

Respectfully submitted,

FERN L. NESSON
Counsel of Record

CHARLES R. NESSON
1525 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4609

Date June 14, 2019