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 Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* FLORIDA ASSOCIATION FOR CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Florida Association of Criminal Defense Lawyers ("FACDL") is a non-profit organization with a membership of over 1,300 attorneys and 29 chapters throughout the state of Florida. Each of FACDL's members is a practicing criminal defense attorney. The questions presented in this case have important implications for all criminal jury trials conducted in the state of Florida.[1]

SUMMARY OF THE ARGUMENT

Reasonable minds can differ. However, the *law* should not be applied to the criminally accused in a different manner based upon in which jurisdiction of our Country they stand trial. Nor in which jurisdiction - federal or state - they stand trial in the State of Florida. The Confrontation Clause, derived from the Sixth Amendment of the United States Constitution, grants the criminally accused the right to face their accusers in person, at trial. The issues in this case are:

1) whether the government makes a good-faith effort to obtain a witness's presence at trial if it

[1] *Amici* certify that no counsel for any party authored this brief in whole or in part, no party or its counsel made any monetary contribution intended to fund the preparation or submission of this brief and that no person or entity other than the *amici* or their counsel made such a contribution. *Amici* certify that it notified the parties via email of its intent to file an amicus brief in support of this Court granting a writ of certiorari within the 10-day notice described in U.S. Supreme Ct. R. 37.2(a), and both parties provided written consent, which have been filed with the Court.

curtails its search for that witness because it already has the witness's deposition testimony;

2) whether the government makes a good-faith effort to obtain a witness's presence at trial if it forgoes an "easy" investigative step that it has "reason to believe" would procure the absent witness; and

3) whether a witness is "unavailable" if the government releases the witness from its custody without making any arrangements to secure the witness's presence at trial.

In each issue there is a circuit court split as well as a conflict with, or misapplication of, this Court's precedent. FACDL requests this Court grant review in this case in order to remedy the inequitable legal application of the Sixth Amendment right of the criminally accused to face his or her accuser.

ARGUMENT

FACDL requests that this Court grant the Petitioner's petition for writ of certiorari in order to remedy the questions presented regarding the legal application of when a witness is unavailable for trial pursuant to the Sixth Amendment's Confrontation Clause.

Of all the Constitutional rights the criminally accused have, after the right to a jury trial, the right to confront the witnesses against them is among the most important right. This Court has explained:

> the right of confrontation [is] 'one of the fundamental guarantees of life and liberty,' and 'a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and *judicial action* by provisions in the constitution of the United States and in the constitutions of most, if not of all, the states composing the Union.'

Pointer v. Texas, 380 U.S. 400, 404 (1965) (emphasis added).

Indeed, the accuseds' right to confront witnesses against him or her is so very fundamental that the State of Florida also incorporated it into its state constitution; which reads "[i]n all criminal prosecutions the accused shall . . . have the right . . . to confront at trial adverse witnesses. . . " Fla. Const. art. I, § 16(a) (2017).

This Court opined "that the Sixth Amendment's right of an accused to confront the witnesses against him is . . . fundamental . . . and is made obligatory on the States by the Fourteenth Amendment." Pointer, 380 U.S. at 403. This Court emphasized "the right of the accused to be confronted with witnesses against him must be determined by the same standards whether the right is denied in a federal or state proceeding. . ." Id. at 407. The issues presented in Petitioner's petition implicate this fundamental right and should be heard by this Court.

A. The Evolution of the absent witness rule.

"The right to confrontation includes both the opportunity to cross-examine [a witness] and the occasion for the jury to weigh the demeanor of the witness." Barber v. Page, 390 U.S. 719, 725 (1968). As with all rules, there lies an exception. In 1900, this Court explained the government could use "the deposition or statement of an absent witness. . . at the final trial . . . when it does not appear that his absence was due to the negligence of the prosecution." Mote v. U.S., 178 U.S. 458, 474 (1900).

In Barber, 390 U.S. at 724-25, this Court ruled "a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." Twelve years later, in Ohio v. Roberts, 448 U.S. 56, 75 (1980), this Court opined:

> [a]lthough it might be said that the Court's prior cases provide no further refinement of this statement of the rule, certain general propositions safely emerge. The law does not require the doing of a futile act. Thus if no possibility of procuring the witness exists, 'good faith' demands nothing of the prosecution. But if there is a possibility, albeit remote, that affirmative measure might provide the declarant, the obligation of good faith *may* demand their effectuation. 'The length to which the prosecution must go to produce a witness… is a question of reasonableness.'

Thus, in 1980, almost forty years ago, this Court set out the *current* rule regarding an absent or unavailable witness. This rule requires the prosecution bear the burden of proving a witness is unavailable, wherein it must establish that despite its good-faith efforts undertaken prior to trial to locate and present that witness the witness remains absent or unavailable. Id.

Since 1980 state and federal courts have attempted to define the Roberts rule. However, after almost forty years of "building on past decisions, drawing on new experience[s], and responding to changing conditions," the state and federal criminal courts need guidance from this Court "for certainty in the [everyday] world of conducting criminal trials." Roberts, 448 U.S. at 65-66. See also Raymond LaMagna, (Re) Constitutionalizing Confrontation: Reexamining Unavailabilty and the Value of Live Testimony, 79 S. Cal L. Rev. 1499, 1552 (2006) (explaining there exists a "confusing, conflicting, and remarkably absurd hodge-podge of precedent [] with each trial judge becoming a constitutional convention unto themselves").

In today's age of technology the way courts determine unavailability and good faith should be based upon the resources available and whether using such resources would provide a reasonable lead to procuring an absent witness for trial. In 1968 this Court acknowledged the evolution of the government's burden to establish a witness is unavailable for trial writing:

> [i]t must be acknowledged that various courts and commentators have heretofore assumed that

> the mere absence of a witness from the jurisdiction was sufficient ground for dispensing with confrontation in the theory that 'it is impossible to compel his attendance, because the process of the trial court is of no force without the jurisdiction, and the party desiring his testimony is therefore helpless.
>
> Whatever may have been the accuracy of that theory at one time, *it is clear that at the present time increased cooperation between the States themselves and between the States and the Federal Government has largely deprived it of any continuing validity in the criminal law*.

Barber, 390 U.S. at 723 (emphasis added).

Moreover, in Roberts, this Court, addressing the juxtaposition of the admissibility of hearsay statements with the Confrontation Clause, expressed "[t]rue to the common-law tradition, the process has been gradual, building on past decisions, drawing on new experience, and responding to changing conditions." 448 U.S. at 65. This remains true still today; and now requires clarification and this Court's guidance.

In fact, this Court once believed "the right of confrontation . . . [was] so essential for the due protection of life and liberty that it is guarded against legislative and *judicial action* by provisions in the constitution of the United States." Pointer, 380 U.S. at 404.

Today, the right to confrontation is no longer guarded against judicial action. The application of the Confrontation Clause and the unavailability of a

witness now differs from state to state, federal circuit to federal circuit. Since the Roberts rule, forty years ago, there exists "[a] confusing, conflicting, and remarkably absurd hodge-podge of precedent." Raymond LaMagna, (Re)Constitutionalizing Confrontation: Reexamining Unavailabilty and the Value of Live Testimony, 79 S. Cal L. Rev. 1499, 1552 (2006). "The lack of analytical guidance available to trial courts [making] unavailability rulings severely curtails the scope and consistency of [an accused's] confrontation rights." Id. at 1558. This should not be so. Therefore, this Court should grant certiorari to provide lower courts in all jurisdictions with guidance and clarification on the absent/unavailable witness rule.

B. A circuit court split now exists and must be examined to preserve this Court's desire to zealously protect an accuseds' fundamental right to a fair trial.

This Court has expressed:

> [t]here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

Pointer, 380 U.S. at 405. This is because

> [c]ertain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously

> injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion.

Greene v. McElroy, 360 U.S. 474, 496–97 (1959).

Despite this Court's desire to zealously protect our country's constitutional goal of an accused's fundamental right to a fair trial and the right of the accused to confront his or her witnesses at trial, there currently exists a split in authority from the circuits. As such, depending on in which jurisdiction an accused is being tried, the legal application of the Sixth Amendment's confrontation clause differs.

The central facet of the Eleventh Circuit Court of Appeals' decision is that the government made a good-faith effort to procure Vixama – a critical witness - for trial before declaring her unavailable and moving to

use her video deposition at trial. United States v. Smith, 928 F.3d 1215 (11th Cir. 2019). It opined the government made a good faith effort by doing the following in preparation for an April 17, 2017, trial date: on February 7, 2017, the case agent learned Vixama was released from federal custody on February 6, 2017. Id. The agent then contacted her uncle, obtained his address, and provided this information to ICE. Id. ICE went to the provided address on February 21, 2017, searched it to no avail, and the case agent followed up in March. Id. At that time he was told ICE did not have the manpower to continue its search for Vixama. Id.

The week before trial and the week of trial, the case agent reached out to Vixama's former attorney four times, issued a subpoena for her via the former attorney, and "thrice attempt[ed] to communicate with Vixama using her boyfriend's cell phone number. Id.

The court opined the government made a "good faith effort" in spite of testimony that the case agent admitted, at least in part, he curtailed his search for Vixama because the government already had her deposition testimony, and though it abstained from conducting an "easy" investigative step that it had "reason to believe" would procure Vixama's presence at trial, and though Vixama was a witness the government months earlier released from its custody without making any arrangements to secure her presence at trial. Id.

The United States Court of Appeals for the Eleventh Judicial Circuit has jurisdiction over federal cases originating in three (3) states - Alabama, Florida

and Georgia. "The circuit includes nine district courts with each state divided into Northern, Middle and Southern Districts."[2] According to the United States Census Bureau, the population in each state encompassed by the Eleventh Circuit is as follows:

Florida: over 21 million persons[3];
Georgia: over 10 and a half million persons[4];
Alabama: almost 5 million persons[5].

If the Eleventh Circuit's decision is left as the new precedent on the proper application of the criminally accuseds' right to face his or her accuser, more than 36 million persons living in the United States will be governed by the divided decision of the Eleventh Circuit Court of Appeals.

Only the month after this decision of which Petitioners seek review, the District of Columbia Circuit Court held the government failed to meet its burden of proving a witness was unavailable for purposes of the Confrontation Clause. In United States v. Burden, 934 F.3d 675 (D.C. Cir. 2019), much like in this case, the parties agreed that the defendants had an opportunity to cross-examine the witness; "[t]he sole question on appeal [was] whether he was 'unavailable' for purposes of the Confrontation Clause." Id. at 686. After the witness provided his statement he was

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[2] http://www.ca11.uscourts.gov /about-court

[3] https://www.census.gov/quickfacts/FL

[4] https://www.census.gov/quickfacts/GA

[5] https://www.census.gov/quickfacts/AL

deported; however, the government failed to ensure his presence at trial before he left the United States. Id.

Citing to its prior precedent[6], the D.C. Circuit explained good-faith, but non-exhaustive efforts to find a witness were inadequate to render a witness unavailable for trial. Id. It also reiterated that the government:

> bears the burden of establishing that its unsuccessful efforts to procure the witness's appearance at trial were 'as vigorous as that which the government would undertake to [secure] a critical witness if it has no [prior] testimony to rely upon in the event of 'unavailability.'

Id. citing Lynch, 499 F.2d at 1023.

The D.C. Circuit warned that "[f]ailing to factor the government's own contribution to the witness's absence into the Confrontation Clause analysis would warp the government's incentives." Burden, 934 F.3d at 686. The court ultimately held "[b]ecause the government's omissions place its efforts below the standard the Confrontation Clause demands, we need not decide precisely how the government should have sought to prevent the witness becoming unavailable." Id. at 699. It further held "that the duty to use reasonable means to procure a witness's presence at trial includes the duty to use reasonable efforts to prevent a witness from becoming absent in the first place." Id.

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[6] United States v. Lynch, 499 F.2d 1011 (D.C. Cir. 1974).

The Eleventh Circuit's opinion was released on July 2, 2019. United States v. Smith, 928 F.3d 1215 (11th Cir. 2019). The D.C. Circuit's opinion was released on August 20, 2019. Burden, 934 F.3d 675. Yet, the two opinions, relying on the same Confrontation Clause and body of law, reached two drastically different holdings. In addition, as Petitioners explain in the Petition, the Eleventh Circuit's majority opinion conflicts with five of the twelve other circuits as to the first question presented (Pet. p.13), three as to the second question presented (Pet. p.17), and five as to the third question presented. (Pet. p. 22).

Furthermore, the Eleventh Circuit has twelve (12) active judges and seven (7) senior judges. In Petitioners' case, only three (3) of those judges heard the case. Even the three judges whom heard the case could not agree on the application of the Confrontation Clause. Relying on the same cases, the three-judge panel came to completely different conclusions as to each issue Petitioner now seeks this Court's review. As such, there exists not only a circuit split, but also a divided decision of first impression in the Eleventh Circuit Court of Appeals.[7]

The trial at issue occurred in 2017, in the age of smartphones, electronic tablets, and smart watches, where almost any information is accessible with the push of the "on" button to the *average* person. Law enforcement has access to technology that it simply did not have forty years ago, such as acoustic gunshot detection systems, body-worn cameras, drones, an

[7] Both the majority and dissent reference this case is one of first impression in its circuit.

infinite number of electronic databases, as well as the ability to collaborate with law enforcement offices nationwide. [8]

Because circuits are split as to what constitutes an unavailable witness and what "good-faith" effort necessitates, this Court should grant certiorari review to assure the continued protection of our country's constitutional goal of the fundamental right to a fair trial. By granting the petition this Court will have the opportunity to control and clarify the constitutional principle of the Confrontation Clause as well as provide necessary guidance, as established by the current circuit court splits, to the federal and state courts.

CONCLUSION

The Petitioner's petition for a writ of certiorari should be granted.

Respectfully submitted,

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[8] https://www.thebalancecareers.com/technologies-that-are-changing-the-way-police-do-business-974549