09-3939-cr

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES J. TREACY,

Defendant-Appellant.

On Appeal From The United States District Court
For The Southern District of New York

BRIEF FOR *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT JAMES J. TREACY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amici Curiae National Association of Criminal Defense Lawyers and the New York State Association of Criminal Defense Lawyers certify that they are nonpartisan, not-for-profit organizations. Amici Curiae have no parent organization or corporation, and no publicly held company owns 10 percent or more of their stock.[1]

[1] Pursuant to Local Rule 29.1(b), Amici Curiae make the following disclosures: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money intended to fund the preparation or submission of this brief; and (3) no person other than Amici Curiae, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

RULE 29(c)(3) STATEMENT

Amici Curiae, the National Association of Criminal Defense Lawyers ("NACDL") and the New York State Association of Criminal Defense Lawyers ("NYSACDL") (collectively, "Amici"), respectfully submit this brief in support of the claim of appellant, James J. Treacy, that his Sixth Amendment right of confrontation was violated at trial by the District Court's virtual prohibition of cross-examination of a news reporter who provided inculpatory testimony on behalf of the government.

NACDL is a nonprofit organization with a direct national membership of more than 12,800 attorneys, in addition to more than 35,000 affiliate members, from all 50 states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. NACDL's mission is to ensure justice and due process for the accused, to foster the integrity, independence, and expertise of the criminal defense profession, and to promote the proper and fair administration of justice.

Given the breadth of its membership and the perspectives it brings to bear, NACDL is regularly permitted to file amicus curiae briefs in this Court and other federal and state courts.

NYSACDL is a not-for-profit corporation with a subscribed membership of more than 800 attorneys, including private practitioners, public defenders, and law professors. It is a recognized State Affiliate of the NACDL. Founded in 1986, NYSACDL's goals include promoting the proper administration of criminal justice; fostering, maintaining, and encouraging the integrity, independence, and expertise of defense lawyers in criminal cases; protecting individual rights and improving the practice of criminal law; enlightening the public on such issues; and promoting the exchange of ideas and research. Like the NACDL, it regularly appears as amicus curiae in cases of significant public interest or of professional concern to the criminal defense bar.

The interest of Amici in this case stems from the dangerous precedent set by the District Court in narrowly circumscribing the cross-examination of a government witness by elevating the witness's claimed journalist's privilege above the Sixth Amendment interest of the defendant in effectively challenging the reliability and the credibility of the witness's testimony. The District Court's position that it can dictate a handful of questions that defense counsel may ask and preclude any follow-up questions to challenge testimony that damages the defense would, if accepted by this Court, move dangerously in the direction of converting

our adversarial system into an inquisitorial one, thereby contradicting the plain intent of the Constitution's Framers.

SUMMARY OF ARGUMENT

As explained in the Statement of Facts of appellant James Treacy's brief, a reporter for the *Wall Street Journal*, Charles Forelle, was called by the government as a witness in Treacy's trial. The reporter was called to testify about the content of several statements he had attributed to Treacy, the former Chief Operating Officer and President of Monster Worldwide Inc., in an article about the back-dating of stock options. The government's theory was that the statements concerned the process for issuing options to *all* employees of the company, and that Treacy falsely denied involvement in that process. The defense theory was that Treacy had simply denied that he was involved in *his own* compensation through options, and that the statements were truthful. The statements on their face did not resolve the issue. How the reporter explained their context was critical.

But when the reporter insisted that the government's view was essentially correct, the District Court, deferring to his assertion of a journalist's privilege, precluded any meaningful cross-examination. It dictated to defense counsel the few, open-ended questions he could ask and told him he would be stuck with the

answers. Thus, the reporter's testimony favoring the government went to the jury essentially unchallenged. Such a process is unacceptable in our adversary system, in which the right to confront adverse government witnesses is enshrined in the Sixth Amendment.

As discussed in section A of the Argument, *infra*, ours is not an inquisitorial system of justice. Indeed, the Confrontation Clause was intended to move our system away from the vices that had plagued the inquisitorial system. Accordingly, the Sixth Amendment, as we discuss in section B, entitles criminal defense counsel, on his client's behalf, to probe a witness's account in order to challenge its reliability. He may do so by asking questions he formulates, within the rules of evidence, to expose defects in the witness's initial ability to observe, his memory, his judgment, and his consistency of recall. Counsel also is entitled to question the witness in order to expose reasons to doubt his credibility. He may do this by asking questions relating to the witness's possible reasons for not telling the truth or for coloring or exaggerating his testimony to favor the other side of the controversy.

As discussed in section C, while the trial court has the discretion to limit repetitive, irrelevant, or harassing cross-examination, it may not prevent meaningful confrontation. Nor is it the province of the trial judge to require

counsel to ask questions in a form prescribed by the court, or not at all. The adversary system reserves to counsel for the defense the right, indeed, the obligation, to use his cross-examination skills, within reasonable limits, to challenge adverse witnesses or testimony and to elicit evidence in support of his client's theory of defense. As discussed in section D, testimonial privileges invoked by witnesses cannot be allowed to trump this right.

In this case, as discussed in section E, when faced with the journalist's motion to quash the government's subpoena for his testimony, the court, rather than substantially limiting or precluding the direct testimony, instead allowed the direct testimony hurting the defense, but then limited the *cross*. It did not permit the defense to ask *any* questions to challenge the reporter's credibility. It permitted no questions aimed at challenging the reliability of the reporter's testimony, except several questions, dictated by the court, that the witness claimed he could not answer. The court then refused to permit any follow-up questioning, or impeachment with the witness's prior inconsistent statement, just an open-ended question that would have invited the witness to repeat the damaging testimony he had given on direct. The court simply took away from counsel the skills of the defense attorney's craft. With respect to this key witness, the defendant was left defenseless.

Forelle's status as a journalist did not immunize him from challenge, once the trial court overruled his claim of privilege and permitted the government to compel his testimony. Journalists are fallible humans. They may ask a vague question and misinterpret the answer. They may make errors in observation or recollection, or reveal uncertainty through a history of making inconsistent statements. They may also wish to see their investigative reporting vindicated – which in this case, where the witness's reporting led directly to the defendant's indictment, would occur through a conviction.

The process utilized by the District Court sets a dangerous precedent that, in the guise of upholding the First Amendment interests of a free press, would dangerously erode the fundamental right that all criminal defendants enjoy under the Sixth Amendment to challenge the government's evidence utilizing the time-honored tools of cross-examination. No exercise of any testimonial privilege can outweigh the fundamental right of a criminal defendant to challenge and try to discredit adverse testimony offered by the government against him.[1]

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[1] Amici do not address in this brief the issue of whether the District Court's error was harmless beyond a reasonable doubt. However, the government should be strictly held to its burden under the applicable standard for constitutional error so as not to dilute the importance of the Confrontation Clause right that was so plainly infringed in this case.

ARGUMENT

THE CONSTRAINTS THE TRIAL COURT PLACED ON THE DEFENDANT'S ABILITY TO CROSS-EXAMINE A KEY PROSECUTION WITNESS VIOLATED THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION

A. Under the Confrontation Clause, a Criminal Defendant Has The Right to Conduct a Probing and Rigorous Adversarial Cross-Examination of the Witnesses Against Him

The "ultimate goal" of the Confrontation Clause "is to ensure reliability of evidence." *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2536 (2009) (quoting *Crawford v. Washington*, 541 U.S. 36, 61 (2004)). However,

> [this] is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. . . . Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

Id. (quoting *Crawford*, 541 U.S. at 61-62).

Cross-examination is the "greatest legal engine ever invented for the discovery of truth." *Howard v. Walker*, 406 F.3d 114, 128 (2d Cir. 2005) (quoting *California v. Green*, 399 U.S. 149, 158 (1970)). What the "crucible" of cross-

examination requires is "rigorous testing . . . [,] a clashing of forces or ideas, thus carrying with it the notion of adversariness." *Maryland v. Craig*, 497 U.S. 836, 845 (1990). The defendant must be allowed to thoroughly "test[] the recollection and sift[] the conscience of the witnesses" against him. *Id.* (quoting *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)). *See also Delaware v. Fensterer*, 474 U.S. 15, 22 (1985) ("[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.").

"Probing" and "rigorous" cross-examination is key to the Anglo-American, common law adversarial system – "one of live testimony in court subject to adversarial testing" – as opposed to the Continental, civil law inquisitorial system, which "condones examination in private by judicial officers." *Crawford*, 541 U.S. at 43. Indeed, the inquisitorial model was "the principal evil at which the Confrontation Clause was directed." *Id.* at 50. *See also Blakely v. Washington*, 542 U.S. 296, 313 (2004) ("Our Constitution and the common-law traditions it entrenches . . . do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury.").

As Justice Scalia explained for the Court in *Crawford*, the Confrontation right emerged from the widespread disgust at the trial and subsequent execution of Sir Walter Raleigh, who was denied the right to confront the man who had accused him before a closed session of the Privy Council. 541 U.S. at 44. At the core of the inquisitorial model was the "involvement of government officers in the production of testimonial evidence," which the defendant was unable to challenge. *Id.* at 53. The vice of this model lay not only in the possibility of official oppression, as in Raleigh's case, but also in the far lesser motivation of the "government officer" – when compared to the criminal defendant – to uncover exculpatory facts. "Trials are by their nature adversarial processes, and it is this adversarial nature that ensures the fulfillment of their truthfinding function." *Howard*, 406 F.3d at 128. It is only through the full engagement of the accused that the "engine . . . for the discovery of truth" functions.

B. The Tools of Cross-Examination Include Testing of the Witness's Original Observation, Consistency of Memory, Motives to Lie or Color His Testimony, Character for Honesty, and Demeanor; The Process Is Necessarily Exploratory and Reactive, and Cannot Be Scripted by the Court

Under the Confrontation Clause, a criminal defendant has the right, on cross-examination, "to delve into the witness' story to test the witness' perceptions and memory," and "to impeach, i.e., discredit, the witness." *Davis v. Alaska*, 415

U.S. 308, 316 (1974). The defense is thus entitled to proceed both by "discrediting the *testimony*" and by "discrediting the *witness*." Francis L. Wellman, The Art of Cross Examination 18 (2d ed. 1921) (emphasis in original).

Defense counsel – who is the only person in the courtroom with the duty to single-mindedly defend his client, and who is also the only person, other than the defendant, with full advance knowledge of the defense theory – must be given the latitude to decide on the most effective mode of attack. For example, counsel may choose to "subtly attack" the witness's factual account by "picking at details" or by using circumstantial evidence. Tom Riley, "The ABC's of Cross-Examination," 41 Drake L. Rev. 35, 55 (1992). Counsel may choose to discredit the witness using a prior inconsistent statement, or to cast doubt on the witness's entire account by showing exaggeration on a single point. *See* Edward A. McGrath, "The Art of Cross-Examination," 2 Rutgers L. Rev. 189, 191-92 (1948). In addition, where, as here, the adverse witness testifies to the contents of a conversation, the defense must be permitted to elicit on cross the full context of that conversation, under the "rule of completeness," which "allows a party to correct a misleading impression created by the introduction of part of a . . . conversation by introducing additional parts of it necessary to put the admitted portions in proper context." *United States v. Holden*, 557 F.3d 698, 705 (6th Cir.

2009). *See also United States v. Castro*, 813 F.2d 571, 575-76 (2d Cir. 1987) ("rule of completeness," which applies to writings under Fed. R. Evid. 106, also applies to oral conversations under Rule 611(a), such that testimony "should at least represent the tenor of the utterance as a whole, and not mere fragments of it") (quoting 7 Wigmore on Evidence § 2099). "Wide latitude should be allowed . . . when a government witness in a criminal case is being cross-examined by the defendant." *United States v. Pedroza*, 750 F.2d 187, 195-96 (2d Cir. 1984).

In addition to guaranteeing a defendant's right to mount a probing challenge to the accuracy of the adverse witness's story, the Sixth Amendment entitles the defendant to elicit, on cross, any potential motive or bias on the witness's part. Indeed, "under the Confrontation Clause the accused *must* be given a full and fair opportunity to cross-examine adverse witnesses for bias that may affect the veracity of their testimony." *Brinson v. Walker*, 547 F.3d 387, 393 (2d Cir. 2008) (emphasis added).

Bias is a "powerful medicine," and it is therefore important for the trial court to allow an attorney to develop a line of questions best suited to raise the jury's doubt about the witness's credibility. *See* James W. McElhaney, "An Impeachment Checklist: Attacking the Witness's Credibility," 78-JAN A.B.A. J. 62, 62 (1992). Recognizing that "most witnesses are partisan because it is human

nature to be on one side or the other," a skilled cross-examiner will often be able to expose the bias or motivation of adverse witnesses. McGrath, *supra*, at 193. *See also* 1 McCormick on Evidence § 39 ("The kinds and sources of partiality are too extensive to be listed exhaustively."). Courts have repeatedly held that the Confrontation Clause is violated where defendants are not permitted to inquire into motive or bias. *See Olden v. Kentucky*, 488 U.S. 227, 231-33 (1988); *Delaware v. Van Arsdall*, 475 U.S. 673, 679-80 (1986); *Davis*, 415 U.S. at 317-21; *Alford v. United States*, 282 U.S. 687, 693 (1931); *United States v. Wolfson*, 437 F.2d 862, 875-76 (2d Cir. 1970); *United States v. Padgent*, 432 F.2d 701, 704-05 (2d Cir. 1970).

Whatever the defense's goals are on cross,

> . . . [c]ounsel often cannot know in advance what pertinent facts may be elicited . . . . For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what fact a reasonable cross-examination might develop.

Alford, 282 U.S. at 692 (internal citations omitted). *See also Pedroza*, 750 F.2d at 195-96 (defense should have been permitted to pursue its theory on cross-examination "without consideration of what basis there was" for it).

C. Notwithstanding the Trial Court's Discretion to Limit Cross-Examination, It Must Allow the Defense to Establish A Factual *Basis* for the Defense Theory; The Court May Not Limit the Defense to Questions that Invite Merely Conclusory Answers

Although trial judges have the discretion to control cross-examination so as to eliminate waste of time, confusion, irrelevant testimony, or harassment, *see Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986), Fed. R. Evid. 611, such discretion "cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony," *United States v. Pedroza*, 750 F.2d 187, 196 (2d Cir. 1984) (quoting *Gordon v. United States*, 344 U.S. 414, 423 (1953)). Indeed, the trial court's "discretionary authority comes about only after sufficient cross examination has been granted to satisfy the Sixth Amendment." *Wilkerson v. Cain*, 233 F.3d 886, 890 (5th Cir. 2000).[2]

[2] *See also Hoover v. Maryland*, 714 F.2d 301, 305 (4th Cir. 1983) (same); *United States v. Tracey*, 675 F.2d 433, 437 (1st Cir. 1982) (same).

Thus, where the court so severely restricts cross-examination that the defendant's ability to challenge the witness is frustrated, the Confrontation Clause is violated. This is illustrated by the seminal holding of *Davis v. Alaska*, 415 U.S. 308 (1974). In *Davis*, the defense in a burglary case sought to elicit witness bias on cross; in particular, the defense wanted to bring out that the witness was on probation pursuant to a juvenile adjudication for burglary, and that the witness may have aided the prosecution in order to avoid any suspicion being cast on him, and to avoid a probation violation. *Id.* at 311. The trial court, pursuant to a state statute prohibiting juvenile dispositions from being admitted as evidence, refused to permit such questioning, but did permit the defense to directly ask the witness whether he thought the authorities might have suspected him of the burglary (the witness at first answered "no," but subsequently admitted that the thought had "cross[ed his] mind"). *Id* at 311-13. The Court, finding that the Confrontation Clause had been violated, rejected the state court's finding that sufficient cross-examination had been permitted to allow the defense to develop its theory of witness bias. "While counsel was permitted to ask [the witness] *whether* he was biased, counsel was unable to make a record from which to argue *why* [he] might have been biased[.]" *Id.* at 318 (emphasis added). The defense was therefore denied the right to "*effective* cross-examination." *Id.* (emphasis added).

As *Davis* makes clear, where defense counsel seeks to establish a theory via cross, it is inadequate and probably useless for counsel to simply ask the witness "whether" the theory is correct, and the trial court may not limit counsel to such a question. Nor may the court limit counsel to asking one or two blunt, easily denied questions, that go to the ultimate issue. Instead, counsel must be permitted to elicit facts and details from which he can then argue to the jury "why" the defense theory is correct.

This principle is illustrated by *Brinson v. Walker*, 547 F.3d 387 (2d Cir. 2008), in which defense counsel sought to impeach the complaining witness by showing he was a racist. The trial court refused to allow the defense to question the witness about his refusal to serve Black patrons at the restaurant where he worked. *Id.* at 396. (Had the witness denied this, his testimony could have been contradicted by that of his supervisor, who, the defense proffered, would attest to the truth of the allegation. *Id.* at 390, 396.) Instead, the court limited counsel to only one question on this topic: whether, upon the defendant's arrest, the witness had taunted the defendant with a racial slur – which the witness denied. *Id.* at 396. The Second Circuit held that this curtailment of cross violated the Confrontation Clause, noting that "[t]he effect of this significant deprivation was certainly not

neutralized by allowing [the defense] to elicit [the witness's] *denial* that he used a racial epithet." *Id.* (emphasis added).

Also on point is *United States v. Fitzpatrick*, 437 F.2d 19 (2d Cir. 1970). There, the defendant in a bank robbery case sought to cross-examine an identification witness (an employee of the bank) regarding the reliability of her observation. The trial court permitted defense counsel to ask whether the witness was sure the bank robber was the defendant sitting in court, and the witness replied, "I am sure." *Id.* at 22. However, when counsel attempted to ask the witness whether she recalled any "particular physical characteristics" of the robber, whether the robber said anything specific to the witness, or whether the witness said anything specific to the robber, the trial court sustained prosecution objections, commenting, "She said she is positive that is the man." *Id.* The Second Circuit held that this restriction on cross violated the Confrontation Clause, since the defendant had not been accorded a "full and fair opportunity to test and explore [the] incriminating testimony" against him. *Id.* at 25. "The trier of fact . . . should have been permitted to see on what specific characteristics of the defendant the witness['s] identification was based and how much of it was unsure." *Id.* The defense could not be restricted to asking the conclusory question

of whether the witness was "sure" – instead, the defense had the right to fully "examine the basis for [the witness's] certainty." *Id.*[3]

These cases illustrate the Sixth Amendment imperative that the defense must be permitted, on cross, to go beyond asking witnesses to confirm or deny the ultimate theory the defense is trying to establish. Instead, the Confrontation Clause requires that the defense be allowed to establish the *basis* for its theory – that is, that it be "permitted to expose to the jury the *facts* from which jurors, as the sole triers of fact and credibility, *could appropriately draw inferences*" that the defense theory is correct. *Davis*, 415 U.S. at 318 (emphasis added).

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[3] *See also United States v. Jimenez*, 464 F.3d 555, 559-62 (5th Cir. 2006) (Confrontation Clause was violated where trial court allowed defense to cross-examine officer as to how far he was from drug transaction he claimed to have observed, and as to whether his view was obstructed, but did not allow defense to probe the witness for additional details relating to his ability to clearly observe) (*Jimenez* is more fully discussed at pages 40-41 of appellant's opening brief); *United States v. Schoneberg*, 396 F.3d 1036, 1040-43 (9th Cir. 2005) (Confrontation Clause violated where defense was permitted to elicit on cross that a witness's testimony was given pursuant to a deal with the government, and that thus the witness had a motive to testify against the defendant, but was not permitted to question the witness about the specific basis for his motive: under the terms of the agreement, the witness would derive a benefit only if the government, in its *sole* judgment, credited his testimony); *United States v. Rodriguez*, 439 F.2d 782, 783-84 (9th Cir. 1971) ("Cross-examination was unduly restricted here. Appellant was not permitted, for example, to inquire whether the witness knew the minimum mandatory sentence he would face if the government elected to prosecute him . . . and questioning of the witness regarding any hope or expectation of leniency he might entertain *was limited to a single question*, put by the court, as to whether he had been given any promise about what the court or prosecutor would do for him because he had testified.") (emphasis added).

Indeed, *controlling* the witness through incremental, fact-by-fact, leading questioning constitutes the "whole idea" of effective cross-examination. Irving Younger, "A Letter in Which Cicero Lays Down the Ten Commandments of Cross-Examination," 3 Litigation 18, 19 (1977). Successful cross-examiners "never lose control of the witness." Francis L. Wellman, The Art of Cross Examination 123 (2d ed. 1921). Where, as here, the trial court prohibits defense counsel from exercising *any* control over the witness on cross, the right to effective cross-examination is vitiated.

Such improper limitation of cross-examination is "especially pernicious." *Delaware v. Van Arsdall*, 475 U.S. 673, 688 (1986) (Marshall, J., dissenting). When the Confrontation Clause is violated in this manner,

> [t]he jury [i]s essentially misled, by the empty gesture of cross-examination, to believe that the defense attorney ha[s] been permitted to use all the tools at his disposal to expose weaknesses in [the adverse witness's] testimony. Having survived what appeared to be counsel's best efforts to undermine the witness' credibility, [the witness's] testimony necessarily carrie[s] more weight with the jury than would the same testimony given without an apparent opportunity to cross-examine.

Id.

D. The Criminal Defendant's Right to Confrontation May Not Be Abrogated by the Invocation of Testimonial Privileges

The fundamental right of a criminal defendant to confront the witnesses against him cannot be denied merely because an adverse witness invokes a privilege to avoid cross-examination. If the trial court believes the privilege predominates over the issues at stake in the trial, its obligation is to exclude or to strike the testimony, not to unduly restrict the defendant's ability to challenge it. The courts have recognized this principle in the face of assertions of privilege that originate in the text of the Constitution, such as the Fifth Amendment's privilege against self-incrimination, or in a legislative enactment, such as one designed to protect the privacy rights of juveniles. Surely the qualified common law privilege of journalists recognized by the District Court in this case is not superior to the above privileges that have been uniformly required to give way to defendants' Sixth Amendment interests.

In *United States v. Cardillo*, 316 F.2d 606 (2d Cir. 1963), the court set a clear rule: where a witness invokes the Fifth Amendment privilege, in order to "prevent inquiry into matters about which the witness testified on direct examination," the witness's testimony should be stricken. *Id.* at 611. If it is not, the defendant's right to confrontation – which entitles the defendant to "test the

truth" of the witness's direct testimony – is violated. *Id.* Though the defendant may not be prejudiced where the witness invokes the privilege as to purely "collateral" matters – such as "general" credibility (established by eliciting unrelated prior convictions, for example) – the invocation of the privilege cannot be allowed to prevent the defendant from inquiring into the *details* of the witness's direct testimony, *id.*, or from impeaching the witness by seeking to establish the untruthfulness of specific events the witness testified to, *id.* at 613. Indeed, "[i]f the purpose of cross-examination is to explore more than general credibility, the subject of inquiry is not collateral," and either the witness must answer, or his testimony must be stricken. *Dunbar v. Harris*, 612 F.2d 690, 693 (2d Cir. 1979). *See also Bagby v. Kuhlman*, 932 F.2d 131, 135 (2d Cir. 1991) ("[T]he sixth amendment is violated when a witness asserts the privilege [against self-incrimination] with respect to a non-collateral matter *and* the defendant is deprived of a meaningful opportunity to test the truth of the witness' direct testimony.") (emphasis in original); *Klein v. Harris*, 667 F.2d 274, 289 (2d Cir. 1981) ("If the witness . . . refuse[s] to testify [by invoking the Fifth Amendment], and if the refusal precludes the defendant from testing the truth of the witness' prior testimony, the trial judge must strike the prior testimony.").

Just as the Fifth Amendment cannot be allowed to neutralize the Confrontation Clause, neither can a statutory privilege, of the kind at issue in *Davis v. Alaska*, 415 U.S. 308 (1974). There, the Court found that the defendant's "vital" Sixth Amendment right to cross-examine a prosecution witness on bias outweighed a state statutory bar against the admissibility of juvenile court dispositions. *Id.* at 320. The Court noted that "[t]he State could have protected [the witness] from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case; the State cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records." *Id.*

If a defendant's right to confront witnesses against him outranks privileges that are explicitly recognized in a constitutional amendment or a statute, then surely the same result must be reached where a witness asserts only a journalist's qualified common law privilege.[4] Moreover, a journalist's assertion of privilege to block cross-examination is weakest where the information at issue consists of the defendant's own inherently non-confidential statements that already have been

[4] This Circuit has repeatedly analyzed any journalist's privilege as being qualified and arising from common law; it has never recognized a First Amendment journalist's privilege. *See, e.g., New York Times Co. v. Gonzalez*, 459 F.3d 160, 172-74 (2d Cir. 2006); *Gonzalez v. National Broadcasting Co., Inc.*, 194 F.3d 29, 35 n.6 (2d Cir. 1999). The District Court's decision did not address the origin of the privilege but assumed it to exist. *See United States v. Treacy*, 603 F. Supp. 2d 670, 672 (S.D.N.Y. 2009).

elicited on direct. *See Gonzalez v. National Broadcasting Co., Inc.*, 194 F.3d 29, 36 (2d Cir. 1999) (holding that the journalist's privilege is overcome as to non-confidential materials as long as they "are of likely relevance to a significant issue in the case, and contain information not reasonably obtainable from other available sources"). If a trial court believes that a journalist's privilege requires him to be shielded from the thorough cross-examination to which a criminal defendant is entitled under the Constitution, then the court should disallow the prosecution from using the journalist as a witness in the first place. A court may not reject the privilege on direct examination, in favor of the government, but then apply the same privilege to preclude the defense from conducting a meaningful cross-examination that is within the scope of the direct or is necessary for impeachment.

E. The Trial Court's Limitation on Cross-Examination, By Prohibiting All Questions Related to Reliability And Credibility and by Allowing the Jury to Hear an Incomplete Account of the Facts, Prevented Appellant From Meaningfully Confronting The Reporter

In its March 3, 2009, letter to the District Court ("March 3 Letter"), the defense proposed a series of cross-examination questions designed to show that Treacy's statements reported in the *Wall Street Journal* article did not evince criminal intent. This challenge was essential to meet the government's argument that Treacy meant for his statements to deceive the reporter and the public.

The cross-examination as proposed by the defense would have endeavored to show that the statements attributed to Treacy, in the "narrow context" of the interview, "were not designed to mislead anyone and instead were consistent with Monster's stock options practices." March 3 Letter at 2-3. The defense argued that these questions were necessary because the context and meaning of Treacy's statements were not readily discernable from the article. *Id.* at 3-5. The proposed questioning was plainly within the scope of the government's direct examination that the court ruled it would allow.

The trial court rejected *all* of the defense's proposed questions and narrowly limited the defense to "establish[ing] context by asking about questions posed by Forelle to defendant that immediately preceded the questions" that elicited the responses reported in the article. *United States v. Treacy*, 603 F. Supp. 2d 670, 673 (S.D.N.Y. 2009).

Although the court's limitation on cross-examination improperly balanced the reporter's interest against the defendant's, the error might not have been prejudicial had the witness given responses that were favorable to the defense. But when the reporter claimed he was unable to recall the questions he asked immediately preceding Treacy's statements, the defense could not challenge his conclusory direct testimony that the interview covered all stock options issued at

Monster, not just Treacy's. The trial court then refused to allow the defense to question the reporter more fully about the context of the interview, to try to use an email the reporter wrote to refresh his recollection or impeach him,[5] or to question his motives for favoring the government. Instead, the trial court restricted the defense to asking the ultimate, open-ended question of whether the interview involved Treacy's options only or all the options distributed at the company, and to then be stuck with the reporter's answer.

The trial court's ruling deprived the defense of the recognized tools of cross-examination and completely barred any challenge to the reliability of the reporter's testimony and to his credibility. Based on the reporter's prior statements in his email, and his failure of memory on the witness stand, a skilled attorney could have attempted either to impeach him by questioning his reliability, or to refresh his recollection and lead him to agree, based upon the balance of the interview, that Treacy's comments were about *his own* options. *See United States v. Fitzpatrick*, 437 F.2d 19, 25 (2d Cir. 1970) (defense counsel entitled to "the chance to change [the witnesses'] view" through cross-examination).

[5] This email, discussed at pages 36-37 of appellant's opening brief, supported the defense's theory by indicating that the reporter's conversation with Treacy concerned only Treacy's options, and not the options of other employees at Monster.

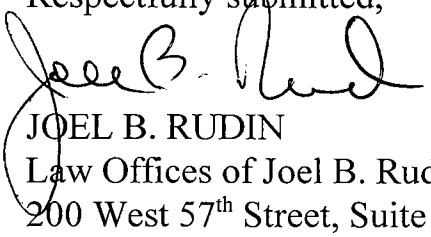
This was not simply a matter, as the District Court put it, of "confirm[ing]" the contents of a newspaper article. 603 F. Supp. 2d at 672. There was nothing about the reporter that made him immune from challenge as to the accuracy or the context of the statements he had reported. His characterization of the context of the interview may have reflected honest error, or it may have resulted from a bias in favor of the government. Consciously or subconsciously, he may have been influenced by a desire to vindicate his reporting questioning the propriety of alleged back-dating practices at Monster and other companies. Journalists, no less than other human beings, would like to feel that they have influenced their society and that they, and their work, are important. The reporter, like any other witness, was fallible, and subject to challenge.

Instead of giving the defendant the latitude on cross to which he was constitutionally entitled, the court instructed defense counsel to ask conclusory, open-ended questions going to the ultimate issue – questions antithetical to the cross-examiner's responsibility to control the witness by using leading questions to develop, step-by-step, the points he is trying to make. The court's prescribed questions allowed the reporter to escape any probing, adversarial challenge and to provide only a vague and self-serving answer that reinforced the damaging testimony he already had given on direct.

CONCLUSION

For the aforementioned reasons, the Court should hold that the court below violated appellant's fundamental rights to present a defense and to confront his accuser under the Sixth Amendment, and then consider whether the government has met its heavy burden, under *Chapman v. California*, 386 U.S. 18 (1967), to establish that such constitutional error was harmless beyond a reasonable doubt.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7) AND LOCAL RULE 32

I, Joel B. Rudin, hereby certify that:

1. I am an attorney representing Amici Curiae National Association of Criminal Defense Lawyers and New York State Association of Criminal Defense Lawyers.

2. This brief complies with Fed. R. App. P. 29(d) and 32(a)(7)(B), because: This brief contains 5,860 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief is prepared in Times New Roman 14 point type, using Corel Word Perfect X3.

3. In making this certification I have relied on the word count feature of the word-processing program used to prepare the brief.

4. A .PDF copy of this brief is being e-mailed, contemporaneously with filing and service by mail, to the Court and to counsel indicated on the certificate of service. The .PDF copy has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 2010, I caused copies of the foregoing brief to be served electronically and by U.S. mail, first-class postage prepaid, on the following:

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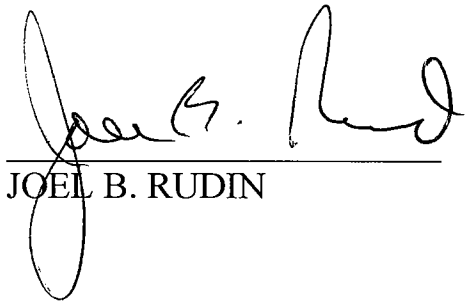

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