No. 19-361

IN THE

Supreme Court of the United States

RENADO SMITH AND RICHARD DELANCY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF CRIMINAL DEFENSE ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Thomas C. Goldstein
Counsel of Record
Daniel Woofter
Charles H. Davis
Erica Oleszczuk Evans
GOLDSTEIN &
RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tg@goldsteinrussell.com

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INTEREST OF *AMICI CURIAE*[1]

Amici are organizations whose members represent a broad cross-section of the criminal defense bar. All have a strong interest in this case because the opinion below unfairly disadvantages amici's clients in defending their cases against the Government, and incentivizes federal and state prosecutors to declare as "unavailable" the witnesses whom defendants most need to cross-examine live in front of a jury. Amici are:

National Association for Public Defense

Alabama Criminal Defense Lawyers Association

Arizona Attorneys for Criminal Justice

Association of Criminal Defense Lawyers of New Jersey

California Attorneys for Criminal Justice

District of Columbia Association of Criminal Defense Lawyers

Georgia Association of Criminal Defense Lawyers

Human Rights Defense Center

The Innocence Project

National Legal Aid & Defender Association

Neighborhood Defender Service of Harlem

Office of the Defender General in Vermont

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[1] Pursuant to Supreme Court Rule 37, counsel for amici represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than amici or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and counsel for all parties received timely notice of amici's intent to file.

SUMMARY OF ARGUMENT

The Government was allowed to play a pre-recorded deposition of its primary, crucial witness to the jury, even though it had negligently allowed her to abscond before trial and then failed to pursue a fresh lead that she was living with her boyfriend in Delaware. The Government said that one reason it did not try to find the boyfriend's address using a routine database search (at essentially no cost) was because the Government already had its witness's testimony in hand. A split panel of the Court of Appeals for the Eleventh Circuit affirmed the admission of the evidence, finding that the witness was unavailable. As thoroughly set forth in the petition, the opinion deepens several well-developed splits worthy of this Court's attention. *See* Pet. 13-25. This brief focuses on the panel majority's legal errors, which greatly disadvantage amici—who represent a broad cross-section of the criminal defense bar—and, more importantly, their clients. The Court should grant the petition and reverse.

I. Under this Court's precedents, testimonial statements of absent witnesses may be admitted at trial only if the declarant is unavailable and the defendant had a prior opportunity to cross-examine. *Crawford v. Washington*, 541 U.S. 36, 59 (2004). The panel majority erred in holding that the Government met its burden to prove that its witness was unavailable to testify at trial.

A. For a witness to be considered "unavailable" because the witness cannot be found, the proponent of the witness's testimony must show that it could not produce the witness despite good faith, *i.e.*, reasonable efforts to secure its witness's attendance at trial. But

here, the panel majority excused the Government's error in "mistakenly" releasing its witness from custody after obtaining her deposition testimony, even though it had not taken any steps to ensure her attendance at trial. This Court has long held that a Government witness's unavailability cannot be caused by its own misconduct, any more than a defendant may admit the out-of-court testimony of a defense witness who is unavailable due to the actions of the defendant. *Motes v. United States*, 178 U.S. 458, 471 (1900). When the Government is the reason its own witness cannot be found, it must procure the witness for trial or it cannot present that witness's testimony. In conflict with *Motes*, which is squarely on point, the panel majority improperly holds the Government to a different evidentiary burden than defendants by excusing the Government's negligence in allowing its witness to abscond.

B. Even had the Government not negligently caused its witness to become unavailable, the panel majority erred in finding that the Government made reasonable efforts to re-secure its witness when it failed to pursue a fresh lead that had a reasonable chance of leading to her, even though doing so would involve little time or money. The witness's former lawyer told the Government that its witness was with her boyfriend in Delaware. And the lawyer gave the Government the boyfriend's name and cellphone number. Yet the Government did not even attempt to run a routine law-enforcement database search to see whether it could obtain the boyfriend's address. Contrary to the opinion below, this Court's precedents require, at minimum, the Government to pursue a hot lead by taking minimally costly "affirmative measures" that have a

reasonable chance of success. *See Hardy v. Cross*, 565 U.S. 65, 71 (2011) (per curiam); *Ohio v. Roberts*, 448 U.S. 56, 74 (1980), *abrogated on other grounds by Crawford*, 541 U.S. at 61-62.

The Government compounded its error by deciding not to pursue the lead because, in part, it already had its witness's deposition testimony. So too the panel majority, which took into account the existence of the prior deposition testimony in determining that the Government's efforts were reasonable. In other words, the panel majority erred by finding that the Government did not need to make the same efforts to find its witness as it would have had it not had the prior-recorded deposition. Nothing in this Court's precedents allows the existence or quality of the prior testimony to lower the Government's burden of proving unavailability.

II. A. Aside from being untethered from Confrontation Clause doctrine, the panel majority's opinion *de facto* shifts the Government's burden of proving unavailability to defendants, who essentially have to show that the Government's efforts were unreasonable. Here, the Government does not dispute that attempting to locate the witness's boyfriend might be fruitful and could be accomplished at minimal cost. Indeed, the Government seemed to believe she was with her boyfriend in Delaware. Rather, it was the panel majority who mused that such efforts *might* be unsuccessful, and thus held the Government was not required to try. Defendants are not in a position to prove that the Government could have been successful in making additional efforts, making this burden shift clearly prejudicial. This is especially concerning for amici, whose

members and their clients already suffer from vast resource disadvantages in defending their clients against the Government.

B. The panel majority's opinion also creates perverse incentives for the Government. In excusing the Government's failure to chase promising leads at minimal cost by looking in isolation at the few efforts the Government did make, the panel majority incentivizes the Government to obtain a witness's testimony beforehand, then let that witness go with no plan to secure her attendance at trial. But the Government witnesses that most demand cross-examination before a jury are the very witnesses the Government is incentivized to declare "unavailable" for confrontation purposes. The Eleventh Circuit's framework eviscerates the core trial right of the accused to confront witnesses against them. As organizations who advocate in this sphere, and whose members are involved in criminal defense work day to day, amici are uniquely situated to highlight the real-world impact the panel majority's framework will have on the ability of the accused to test the veracity of the Government's witnesses.

ARGUMENT

I. The Government Failed To Show That Its Witness Was "Unavailable" To Testify At Trial, So Admitting Her Prior Testimony Into Evidence Violated Petitioners' Confrontation Rights.

A. The Government Cannot Establish That Its Witness Is "Unavailable" When It Negligently Allowed Her To Abscond.

The Government's "essential witness to th[e] case," Pet. App. 152a-153a, a Haitian national, was brought into the United States and detained by Immigration and Customs Enforcement (ICE) to be interviewed in connection with petitioners' allegedly criminal conduct, *id.* at 2a, 8a. After she gave her deposition, the material witness complaint against her was dismissed, and the Government had 48 hours to enforce an immigration detainer that ICE had lodged against her. *Id.* at 10a. However, the Government did not pick up or detain her in that time, so she was released from custody—without any effort by the Government to obtain her contact information or address, nor any other measures to ensure that she would appear at petitioners' trial.[2] *Ibid.* Because the Govern-

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[2] Amici take no position on what steps the Government would have needed to take had it deported its witness for her deportation to render her "unavailable." *Cf. United States v. Burden*, 934 F.3d 675, 686 (D.C. Cir. 2019) (when the Government "deport[s] the witness, [it] will have to make greater exertions to satisfy the standard of good-faith and reasonable efforts than it would have if it had not played any role"); *United States v. Tirado-Tirado*, 563

ment allowed the witness to abscond by making absolutely no effort before releasing her to ensure that she would be available to testify at trial, it cannot meet its burden of proving that the witness was "unavailable" such that her deposition testimony could be admitted into evidence, as required by the Confrontation Clause, U.S. Const. amend. VI.

There is no real dispute in this case that the Government "mistakenly released" its witness. *See* Pet. App. 10a n.2 (panel majority describing that the Government "mistakenly released" the witness); *id.* at 72a (dissent noting that the Government "accidentally" released its witness); *id.* at 113a (district judge describing the witness as "mistakenly released by the US Government"). And there is no dispute that the Government made no concrete arrangements at the time of release to try to ensure her attendance.

This Court has long held that when the Government witness's "absence was manifestly due to the negligence of the officers of the Government," the admission into evidence of that witness's prior testimony is "in violation of the constitutional right of the defendants to be confronted with the witnesses against them." *Motes v. United States*, 178 U.S. 458, 471 (1900). This case is materially indistinguishable.

F.3d 117, 123-24 (5th Cir. 2009) (witness not unavailable despite his deportation back to Mexico, because the Government had made no concrete arrangements to have the witness testify at trial and failed to make reasonable efforts thereafter to secure his attendance). Rather, amici clarify that the crucial fact here is that the Government released the witness without first taking any steps (let alone reasonable steps) to secure her attendance at trial.

In *Motes*, like here, the Government witness was in its custody. 178 U.S. at 468. Moreover, in *Motes*, like here, the Government released the witness from its custody without any plan for ensuring its witness's attendance at trial. *Ibid.* And just like here, the testimony was otherwise admissible because "all of the defendants . . . had an opportunity to cross-examine" the witness and the witness had "in fact" been cross-examined. *Id.* at 468-69. Importantly, the Court in *Motes*, *unlike* the panel majority here, refused to give the Government a pass even though the Government made post-release efforts to re-secure the witness, holding that admitting the testimony violated the defendants' confrontation rights. *Id.* at 474.

The panel majority below glossed over the fact that the Government was partly responsible for its witness's absence from petitioners' trial. According to the panel majority, after the Government's witness was "mistakenly released," it "was reasonable for the government to try to locate [her]." Pet. App. 28a. No doubt. But the panel majority was wrong to go a step further, and hold that the Government's post-negligence efforts were sufficient to render her unavailable for purposes of admitting her deposition into evidence. This Court has never held that after-the-fact efforts can cure the Government's negligence in causing the unavailability.

Take the Government's post-release efforts in *Motes*, as described by this Court:

> The United States marshal testified on behalf of United States that he had instructed his deputies that Taylor had escaped; that he had offered a reward of two hundred dollars for his arrest; that he had made diligent search

> in the city of Birmingham for Taylor, and could not learn anything as to his whereabouts. . . . The United States then offered as a witness a deputy sheriff, who testified that the sheriff of Jefferson County and his deputies had been on the lookout for Taylor ever since his absence was known; that they had had photographs taken of him and sent them to various places, and that the deputies had been on the lookout for him all over Birmingham and other parts of Jefferson county, and that they had been unable to find him anywhere.

178 U.S. at 469. (Note, the Government's efforts in this case were far less extensive, *see infra* Part I.B.) It was apparently of no moment to this Court that the Government, after having negligently released the witness, expended great effort in attempting to re-secure him. Neither should the Government's attempts in this case to re-secure its witness excuse its negligence in allowing her to abscond in the first place. Rather, *Motes* requires that if the Government is the reason its own witness is unavailable, it must find a way to procure the witness for trial or the witness's testimony cannot be entered into evidence.

At the very least, as some circuits have held, the Government must "make greater exertions to satisfy the standard of good-faith and reasonable efforts" when it "itself bears some responsibility for the difficulty in procuring the witness" than "it would have if it had not played any role" at all. *United States v. Burden*, 934 F.3d 675, 686 (D.C. Cir. 2019); *United States v. Yida*, 498 F.3d 945, 955-56 (9th Cir. 2007) ("[T]he

appropriate time-frame [for assessing the government's actions] should not be limited to the government's efforts to procure [its witness]'s testimony *after* it let him be deported, but should instead include an assessment of the government's affirmative conduct which allowed [him] to be deported . . . in the first instance."); *United States v. Mann*, 590 F.2d 361, 368 (1st Cir. 1978) ("Implicit . . . in the duty to use reasonable means to procure the presence of an absent witness is the duty to use reasonable means to prevent a present witness from becoming absent."). It would be especially unfair to excuse the Government's failure to ensure its witness's attendance at trial, when defendants will presumably not be afforded the same courtesy. *See* Fed. R. Evid. 804(a)(5) (hearsay exception for unavailable witnesses "does not apply" if proponent "procured or wrongfully caused" the declarant's unavailability to prevent declarant from attending trial). On top of being untethered doctrinally from the decisions of this Court, the Eleventh Circuit unfairly advantages the Government. *See also infra* Part II.

B. The Government Failed To Show That It Made Good Faith Efforts To Locate Its Witness.

Even if the Government had not negligently caused its witness's unavailability, it failed to make reasonable efforts to secure her attendance at trial. And the Government's burden to make reasonable efforts is not at all lowered merely because the witness's out-of-court testimony was given in a cross-examined deposition, as the Government's agent and the panel majority believed.

1. This Court held in *Barber v. Page*, 390 U.S. 719 (1968) that "a witness is not 'unavailable' for purposes of the [unavailability] exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Id.* at 724-25. In cases where, like here, "there is a possibility, albeit remote, that affirmative measures might produce" the witness, the "ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness." *Ohio v. Roberts*, 448 U.S. 56, 74 (1980), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004). "The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness." *Ibid.* (quoting *California v. Green*, 399 U.S. 149, 189 n.22 (1970) (Harlan, J., concurring)) (alteration in original).[3]

This Court's decisions in *Barber* and *Roberts* are informative. In *Barber*, the State of Oklahoma sought to introduce the prior testimony of a witness who was, at the time of trial, incarcerated in a federal penitentiary in Texas, and thus "outside the jurisdiction" of

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[3] In this section, amici rely solely on this Court's cases in which the witnesses were unavailable due to no fault of the Government. These precedents are more than sufficient to show that the Government's efforts in this case were not reasonable—setting aside the fact that the Government was partly responsible for its witness's absence. To the extent that the Government's "mistaken" release is also factored into the analysis, the Government fell even shorter of its burden. *See supra* pp.9-10 & note 2 (citing circuit cases like *Burden*, 934 F.3d at 686, that require the Government to make "greater exertions to satisfy the standard of good-faith and reasonable efforts" when it "itself bears some responsibility for the difficulty in procuring the witness").

the State. 390 U.S. at 720. The court of appeals "reasoned that because the State would have had to request an exercise of discretion on the part of federal authorities, it was under no obligation to make any such request" to establish unavailability. *Id.* at 724. This Court flatly rejected the notion.

According to the Court, "the sole reason why [the State's witness] was not present to testify in person was because the State did not attempt to seek his presence," and the "right of confrontation may not be dispensed with so lightly." 390 U.S. at 725. The "possibility of a refusal" by the federal authorities "is not the equivalent of asking and receiving a rebuff," so the State was required to ask. *Id.* at 724-25 (internal quotation marks omitted). In other words, this Court concluded that the State's witness was not unavailable even though he was outside the State's jurisdiction—the State was required to make the minimal effort of asking the federal authorities for assistance in procuring the witness to testify in the state trial.

In *Roberts*, this Court held that the prosecution had made good faith efforts to locate the witness, because none of the Government's other leads were remotely likely to produce the witness; the "law does not require the doing of a futile act." *See* 448 U.S. at 74. In *Roberts*, unlike here, there was "no clear indication, if any at all, of [the witness's] whereabouts." *Id.* at 76. And "the great improbability that [additional] efforts would have resulted in locating the witness, and would have led to her production at trial, neutralize[d] any intimation that a concept of reasonableness required their execution." *Ibid.* As the dissent below aptly describes the situation in *Roberts*—"the trail had effec-

tively gone cold for the missing witness: the government's most recent information about the witness's whereabouts was seven-to-eight months old, and the government knew only generally that the witness was, at that time, traveling outside Ohio." Pet. App. 97a (Rosenbaum, J., concurring in part and dissenting in part).

In this case, there is no question that the Government's witness was *within* its jurisdictional reach.[4] *Compare Mancusi v. Stubbs*, 408 U.S. 204, 212 (1972) (witness was unavailable after moving to Sweden where the State "was powerless to compel his attendance at the second trial, either through its own process

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[4] The panel majority tries to obfuscate this fact by reasoning that the Government would have had to coordinate its efforts to find and secure the witness for trial:

> Miami federal officials would have had to secure the ready help of either their federal [Homeland Security Investigations (HSI)] counterparts, or state law enforcement, in Delaware to attempt to find the boyfriend at that street address. The federal HSI agents, or state law enforcement, in Delaware would then have had to get lucky and actually find the boyfriend at that address, and then persuade him to reveal [the witness's] whereabouts so they could more formally serve the trial subpoena on [her]. Assuming that the boyfriend would help them find the girlfriend he had presumably been hiding, ICE [Enforcement and Removal Operations], which had the detainer, would have to be on the spot at just the right moment to grab her, else [the witness] would once again go on the run.

See Pet. App. 46a-47a. But this is the *federal government*. It cannot be the rule that the largest prosecuting sovereign with the most resources and the furthest reach is excused, based on those very attributes, for failing to chase down reasonable leads within its jurisdiction.

or through established procedures depending on the voluntary assistance of another government"). And unlike in *Roberts*, the Government in this case failed to pursue a fresh, promising lead to find its witness—not stale leads with no real chance of success: the Government had it on good authority that its witness was staying with her boyfriend, and that her boyfriend lived in Delaware. *See* Pet. App. 28a (panel majority noting that the witness's boyfriend was "reportedly in Delaware"); *id.* at 72a (dissent noting that the witness's "attorney informed the government that [the witness] was in Delaware with her boyfriend"). The Government even had her boyfriend's name and cellphone number.

But instead of "running a basic, routine, quick, and inexpensive database search of the boyfriend's name to ascertain his address . . . the government did no more than just engage in minimal efforts to twice call and once text the boyfriend," Pet. App. 78a (Rosenbaum, J., concurring in part and dissenting in part), and relied on the witness's former attorney to forward a subpoena to the boyfriend by email, with the hope he would pass it along to the witness, *id.* at 72a-73a. Indeed, "[n]o evidence suggests the government took even five minutes to check for the boyfriend's profile on Facebook, Twitter, or Instagram, or to punch his name into Google to see what those quick searches could dredge up." *Id.* at 78a. And when asked by the trial judge *during trial* whether the Government had run the boyfriend's name through any database or otherwise made any attempt to find his address, the case agent replied "Not yet." *Id.* at 73a.

There is little question that had the Government not had its witness's deposition, it would have made

more of an effort to find her. The Government admits as much. At the trial court, the Government's agent responded that one of the reasons it had not made any effort to ascertain the boyfriend's address in Delaware was "because [he] assumed that [the witness had] already given the videotaped deposition," so he "didn't really need to try to find her." Pet. App. 51a n.18. But she was "an essential witness to this case." *Id.* at 152a-53a. And the fundamental point of *Roberts* is that the Government must take reasonable "affirmative measures" that have even a "remote" possibility of success. *Roberts*, 448 U.S. at 74; *see Hardy v. Cross*, 565 U.S. 65, 71 (2011) (per curiam) (state court not unreasonable in finding that the State was not required to take "additional steps" to find a witness when there was "no reason to believe" such efforts would be successful).

To be sure, the Government need not "exhaust every avenue of inquiry, no matter how unpromising." *Hardy*, 565 U.S. at 71-72. But at minimum, when, as here, the Government has a promising lead to locate the witness, and pursuing that lead would require minimal effort, the Government *must* pursue it to show that it made reasonable, good faith efforts. Instead of holding the Government to that low burden, the panel majority excused the Government's failure to take minimal steps by looking in isolation at the few efforts that had previously been made. *See* Pet. App. at 43a-44a (accusing the dissent of "Monday-morning quarterbacking" in light of the actions the Government took).

Of course, making some efforts to pursue a lead does not excuse the Government's failure to take other

obvious and promising steps that require minimal resources. Consider the following example: the Government gets a tip that its witness is staying with either her uncle or her boyfriend. It would assuredly fail to satisfy *Roberts* if the Government located her uncle's residence and checked there, but after failing to find her at her uncle's ignored the part of the tip about her boyfriend. Under the panel majority's reasoning, the Government's efforts would be sufficient because they did *something*. Pet. App. 44a (rejecting that the Government had to do a routine database search for the boyfriend's address because "this is not a case where the government took no action when presented with a new lead"). This Court's precedents require more of the Government to prove its witness is unavailable.

2. Relatedly, the panel majority erred in folding into the unavailability inquiry the fact that the witness was previously subject to cross-examination. According to the panel majority, "neither the case agent, nor the prosecutor, nor this Court is required to pretend [that the witness] was never deposed for the express purpose of having her deposition presented at trial," distinguishing "testimony presented at a preliminary hearing or on the off-chance the witness might become unavailable later." Pet. App. 52a. The panel majority believed that although "prior cross-examination *alone* cannot substitute for the government's burden to establish a witness is unavailable," that fact "is relevant and important." *Id.* at 52a-53a (emphasis added).

But it is not a relevant fact at all. And it shouldn't be. Meeting *Crawford*'s minimum requirement of prior opportunity to cross-examine has nothing to do with the Government's completely unrelated burden to

show it took reasonable steps to secure its witness for trial. *See* 541 U.S. at 55 ("prior opportunity to cross-examine" is "a necessary" but not "sufficient . . . condition for admissibility of testimonial statements").

And there is no exception to this rule for particularly good-quality cross-examination. Certainly *Crawford* makes no such distinction among different kinds of cross-examined testimony. The Court did not say, for example, that "particularly good cross-examination is relevant to how hard the Government needs to try to re-secure its lost witness." On the contrary, the Court expressly eschewed a "general reliability exception" to the confrontation right of defendants to face their accusers in court. 541 U.S. at 62 (abrogating *Roberts* on this score); *Barber*, 390 U.S. at 725 (the "right to confrontation is basically a trial right," which "includes *both* the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness") (emphasis added).

The confrontation exception for unavailable witnesses is just that—an *exception*. Implicit in this exception is a historical "preference for face-to-face accusation." *Roberts*, 448 U.S. at 65. As this Court stated long ago, the "primary object" of the Confrontation Clause was to provide the accused

> an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242-43 (1895).

No out-of-court cross-examination is a substitute for compelling the witness "to stand face to face with the jury," and it is manifestly inappropriate to consider the existence or quality of prior testimony in determining whether the Government has met its burden of showing that the witness is unavailable.

II. The Decision Below Unfairly Prejudices Defendants.

A. The Panel Majority Impermissibly Shifts The Government's Evidentiary Burden To Criminal Defendants.

"As with other evidentiary proponents, the prosecution bears the burden of establishing" that its witness is unavailable. *Roberts*, 448 U.S. at 74-75. As previously discussed, when "there is a possibility" that the witness may be found and called to testify at trial, this means the prosecution bears the burden of establishing that it made reasonable, good-faith efforts to secure the witness's attendance. *Ibid.*; *Barber*, 390 U.S. at 724-25.

As the dissent below correctly reproves, *see* Pet. App. 85a-88a, the panel majority's opinion—which excuses the Government's failure to take reasonable, non-costly steps to pursue a promising lead—*de facto* shifts the burden to criminal defendants—who effectively now have to prove that the Government's actions were *un*reasonable. Petitioners should not have had to show that trying to find the address of the witness's boyfriend had a sufficiently promising chance of leading to the witness. How could they? Defendants cannot prove that the Government is not simply going through the motions to clear the minimal bar set by

the panel majority. Rather, under this Court's precedents, the Government was required to show it had "no reason to believe" that finding the boyfriend's address would lead to the witness. *See Hardy*, 565 U.S. at 71; *Roberts*, 448 U.S. at 74.

The Government never gave any reason to doubt that a routine database search would turn up the boyfriend's address. Neither did the Government show that there was any doubt that the witness was staying with her boyfriend. Far from it: the Government attempted to send a subpoena to her through him. Pet. App. 86a (Rosenbaum, J., concurring in part and dissenting in part). Rather than hold the Government to its burden, the panel majority tries to do the Government's job for it, stating that although attempting to locate the boyfriend "*might*" have led to the witness, "the record contains no evidence that the boyfriend ever had an address in Delaware or that a database search would have revealed an address for him in Delaware," and that criticizing the Government for what it did *not* do was "Monday-morning quarterbacking." *Id.* at 42a-43a (majority opinion). But of course no record evidence *conclusively* establishes the boyfriend's whereabouts—the Government did not attempt even minimal efforts to locate him. Thus, there was simply nothing to "Monday-morning quarterback," because the Government made no plays at all. And unlike the Government, petitioners could not themselves search law-enforcement databases for the witness's boyfriend's address. Nor could they do anything even if they had found it.

All we have are the panel majority's musings as to why searching for the boyfriend *might* not have been fruitful. Moreover, the panel majority draws out and

exaggerates the effort the Government would have had to expend to succeed. *See supra* note 3. Thus "it is unclear," according to the court, "why [the Government agent] would think that even if he got lucky and found the boyfriend's address in Delaware, the latter would reveal [the witness]'s whereabouts and help ICE snatch and jail her," given previously unsuccessful efforts to locate the witness at her uncle's home. Pet. App. 46a. Obviously, it is "unclear" because the Government itself never made the argument, and petitioners have no realistic way to disprove the negative.

The panel majority's decision is a problem for all defendants, especially the indigent. According to recent data, there are about 1,000 public defender officers at the state and local levels with about 15,000 litigation attorneys receiving over 4 million indigent defense cases a year, and only an average of about 10 percent of the total state judicial-legal expenditures go to indigent defendants. Roy L. Austin, Jr. et al., *Prosecution and Public Defense: The Prosecutor's Role in Securing a Meaningful Right to an Attorney* 2 (Mar. 2019), http://bit.ly/2B37gnz. Under the Eleventh Circuit's framework, criminal defendants, who already suffer a resource disadvantage in defending their cases, have no realistic way to dispel the doubts that will be raised by the courts (*not* the Government, even though it is the Government's burden). The prejudice this burden shift exacts on defendants exemplifies the wisdom in requiring the Government to affirmatively prove that it made *all* reasonable efforts to locate its missing witnesses—which is exactly what this Court's precedents require.

B. The Panel Majority Creates Perverse Incentives For The Government.

This Court's confrontation precedents portend that

> When the government seeks to rely on prior recorded statements of a witness on the ground that the witness is unavailable, it 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."

Burden, 934 F.3d at 686 (internal quotation marks omitted) (alterations in original). Any other rule "would warp the government's incentives." *Ibid.*

The panel majority's opinion actually incentivizes the Government to obtain a witness's testimony beforehand, then let that witness go with no plan to secure her attendance at trial, knowing that making *some* efforts later on to find her will satisfy the court's "totality of the circumstances" balancing test. *Compare* Pet. App. 24a-25a & n.7 (citing Fourth Amendment balancing test cases for how to determine "reasonableness"), *with Crawford*, 541 U.S. at 67-68 (in the Confrontation Clause context, the Framers "were loath to leave too much discretion in judicial hands," so "open-ended balancing tests" are disfavored because "[v]ague standards are manipulable").

The kind of witness who is the most problematic for the Government, *i.e.*, the kind of witness most susceptible to faltering in front of a jury, is the kind of

witness the Government is most likely to want to get on record beforehand and not have tested live at trial. The panel majority's totality of the circumstances test allows the Government to do just that. If the Court permits the Government to satisfy its burden to establish that it made reasonable efforts by pursuing only *some* of its promising leads, it would "sanction the government's procuring depositions of witnesses, especially shaky witnesses, but then discourage attempts to bring the witness to trial so long as the government is satisfied with what is in the transcript." *See Mann*, 590 F.2d at 367 (footnote omitted). In fact, it's even worse under the panel majority's test, which lowers the Government's burden even further if it does a good job in the court's estimation of developing the testimony in a deposition. *See supra* Part I.B.2.

Of course, those are the very witnesses whom defendants most need to cross examine in front of the jury. Giving the Government a leg up in establishing unavailability unfairly prejudices defendants' ability to test the Government's most unreliable witnesses "face to face with the jury," such that the jury may "judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox*, 156 U.S. at 242-43. Forcing witnesses to testify in front of the jury discourages them from trying to lie, in a way that a pre-recorded deposition does not, as it puts them face to face with those who will judge their veracity.

It will be very difficult for defendants to inquire into the Government's motivations in its post-release search, so the panel majority's test is ripe for manipulation. *See United States v. Tirado-Tirado*, 563 F.3d

117, 125 n.5 (5th Cir. 2009) ("showing that the government acted in good faith from a subjective perspective is necessary . . . to establish good faith for the purposes of the unavailability inquiry") (citing *Roberts*, 448 U.S. at 74). The Eleventh Circuit's framework allows the Government to game the system by putting a lot of effort into the initial testimony of shaky witnesses, knowing that it can release them and make perfunctory efforts to locate them later.

* * *

Amici provide a boots-on-the-ground perspective regarding the critical importance of live cross-examination in federal and state courtrooms across the United States. Their collective understanding reveals that the issues in this case arise frequently and that live cross-examination makes a significant difference for criminal defendants. Because the panel majority's opinion requires defendants to somehow prove that it would be reasonable for the Government to take additional steps to secure its witnesses, and incentivizes federal and state prosecutors alike to declare the most critical witnesses "unavailable" for cross-examination at trial, amici stand together in urging this Court to grant the petition and reverse—to safeguard their clients' constitutional rights to confrontation, effective assistance of counsel, and due process of law.

CONCLUSION

This Court should grant the Petition for a Writ of Certiorari and reverse.

Respectfully submitted,

Thomas C. Goldstein
Counsel of Record
Daniel Woofter
Charles H. Davis
Erica Oleszczuk Evans
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tg@goldsteinrussell.com

October 18, 2019