No. 19-361

In the Supreme Court of the United States

RENADO SMITH AND RICHARD DELANCY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the lower courts correctly determined, on the facts of this case, that a witness was unavailable under the Sixth Amendment's Confrontation Clause because the government made a reasonable, good-faith effort to secure the witness's presence at petitioners' trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-105a) is reported at 928 F.3d 1215.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2019. The petition for a writ of certiorari was filed on September 18, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioners Renado Smith and Richard Delancy were each convicted on one count of conspiracy to encourage and induce aliens to enter the United States, in violation of 8 U.S.C. 1324(a)(1)(A)(iv) and (v)(I); 21 counts of encouraging and inducing aliens to enter the United States, in violation of 8 U.S.C. 1324(a)(1)(A)(iv) and (v)(II); and one

count of attempted unlawful reentry by an alien who has previously been removed, in violation of 8 U.S.C. 1326(a) and (b)(2). Smith Judgment 1; Delancy Judgment 1. The district court sentenced Smith and Delancy to 87 and 90 months of imprisonment, respectively, each to be followed by three years of supervised release. Smith Judgment 2-3; Delancy Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-105a.

1. a. Petitioners are Bahamian nationals who, in November 2016, attempted to smuggle 21 aliens—20 Haitians and one Bahamian—into the United States on a small, 24-foot boat. Pet. App. 2a. On November 4, 2016, petitioners departed Freeport, Bahamas, by boat at night with their passengers. *Id.* at 2a, 5a. Not long after their departure, petitioners got lost and ran out of fuel. *Ibid.* Petitioners and their passengers were then adrift at sea for six days without food and with little water. *Id.* at 2a. Delancy nevertheless instructed the passengers not to use their cell phones and not to wave at, or attract the attention of, passing boats. *Id.* at 5a-6a.

On November 9, 2016, a U.S. Customs and Border Patrol aircraft spotted the drifting boat and called the U.S. Coast Guard, which dispatched a vessel. Pet. App. 2a-3a. When the Coast Guard arrived, all of the passengers, who by that time were dehydrated and had not eaten for days, were eager to leave the disabled boat. *Id.* at 3a. Petitioners, however, asked the Coast Guard for water and fuel to continue their trip. *Ibid.* Petitioners ultimately agreed to board the Coast Guard cutter only after one of its officers informed them that the Coast Guard could not provide them with fuel. *Ibid.*

Petitioners told Coast Guard officers that they had been taking their passengers to Bimini, Bahamas. Pet.

App. 3a. The officers, however, concluded that petitioners' purported itinerary "didn't make sense" because petitioners' boat had been found south of Bimini—halfway between Bimini and Key Largo, Florida—and the currents in that area are generally northerly and therefore would not have carried a drifting boat from Freeport south beyond Bimini. *Ibid.*

Coast Guard personnel processed petitioners and their 21 passengers. Pet. App. 4a. In doing so, they discovered that none of the passengers possessed any identification and none had permission to enter the United States. *Ibid.* They also discovered that petitioners had been previously removed from the United States and did not have permission to reenter. *Ibid.* The trial evidence later showed that Smith had also previously been convicted in the Southern District of Florida for alien smuggling for profit, and that Delancy had been convicted there for illegal reentry after removal. *Ibid.*

Once petitioners' passengers had been processed by the Coast Guard, the government sent most of them to Haiti rather than bring them to the United States. Pet. App. 8a. The government, however, brought four passengers into the United States to be interviewed about petitioners' criminal conduct. *Ibid.* Of particular relevance here, the government detained and interviewed Davidson Francois and Vanessa Armstrong Vixama. *Id.* at 8a, 10a n.2.

2. a. A federal grand jury indicted each petitioner on multiple alien-smuggling counts and on one count of attempted unlawful reentry by an alien who has previously been removed. Pet. App. 7a-8a.

Shortly thereafter, the government filed a material-witness complaint against Vixama and Francois in order to hold them to provide testimony against petitioners. Compl., *United States* v. *Armstrong-Vixama*, No. 1:16-mj-3714 (S.D. Fla. Dec. 23, 2016); see Pet. App. 8a, 10a n.2. Although Vixama had initially been held by Immigration and Customs Enforcement (ICE) in an immigration-detention facility, her arrest on the ensuing material-witness warrant resulted in her January 2017 transfer into the custody of the U.S. Marshals Service. Pet. App. 8a. Personnel within ICE's Enforcement and Removal Operations (ERO) directorate then lodged with the Marshals Service an immigration detainer against Vixama to ensure that she would be transferred back to ICE custody "for immediate deportation" once the material-witness complaint against her was dismissed. *Id.* at 8a-9a. The detainer stated that "[f]ederal regulations (8 CFR 287.7) require that you detain the alien for a period not to exceed 48 hours (excluding Saturdays, Sundays and Federal holidays) to provide adequate time for [ICE] to assume custody of the alien." Gov't Ex. A (D. Ct. Doc. 80-1 (Apr. 26, 2017)).

Petitioners "agreed to [a] procedure" under which Francois and Vixama, who were then both detained as material witnesses, would be deposed and then removed from the United States as soon as their depositions had been taken. Smith Mot. to Exclude Dep. 1, 3 (Apr. 18, 2017); see Delancy Mot. to Adopt (Apr. 18, 2017) (adopting Smith's motion); Pet. App. 19a n.5. The parties thus specifically intended that Francois's and Vixama's videotaped depositions would be played to the jury during petitioners' trial. Pet. App. 112a (finding); see *id.* at 18a & n.5. That agreed-upon process was consistent with 8 U.S.C. 1324(d), which provides that the videotaped

deposition of a witness to alien smuggling, in violation of 8 U.S.C. 1324(a), "who has been deported or otherwise expelled from the United States, or is otherwise unable to testify, may be admitted into evidence in an action brought for that violation if the witness was available for cross examination." 8 U.S.C. 1324(d). Pursuant to the parties' agreement, both Vixama and Francois provided videotaped depositions at which petitioners were present and (through defense counsel) cross-examined the witnesses. Pet. App. 9a-10a.

Francois, whose videotaped testimony was admitted at petitioners' trial without objection, testified that his father had planned the trip to bring Francois to the United States for schooling. Pet. App. 5a. Francois further testified that other passengers on the boat had stated that they were headed to the United States and that he, like the others, believed that petitioners were bringing them to the United States. *Ibid.* Francois's testimony also described the relevant events at sea. *Id.* at 5a-6a.

Vixama's testimony was "strikingly similar" to Francois's. Pet. App. 6a. She stated that she had traveled from Haiti to Freeport, Bahamas in April 2016 in order to travel to the United States illegally after having unsuccessfully applied for student visas three times. *Ibid.* Vixama explained that her family had paid $5000 for her trip, that she believed she was going directly from Freeport to Miami, and that one of petitioners told her that the trip would take three hours. *Ibid.*

b. On Friday, February 3, 2017, after Vixama had given her videotaped deposition, a magistrate judge dismissed the material-witness complaint against Vixama. Pet. App. 10a, 108a; see 18 U.S.C. 3144. On the following Monday, February 6, 2017, U.S. Marshals released

Vixama from custody. Pet. App. 10a, 108a. At the time, ICE agents had not yet arranged to take her back into detention for her removal from the United States. *Ibid.*

On Tuesday, February 7, 2017, the Department of Homeland Security special agent assigned to work on petitioners' prosecution, Craig Nowicki, learned of Vixama's release and tried to locate her. Pet. App. 10a. Agent Nowicki contacted Vixama's uncle using a phone number that Vixama had previously provided, and obtained the uncle's address in Coral Springs, Florida. *Id.* at 10a-11a, 149a. Agent Nowicki, however, had "no basis to take Vixama into custody," because the material-witness complaint had been dismissed by the court, Vixama had not been charged with any criminal offense, and ICE's immigration detainer involved a civil immigration matter within the authority of ICE ERO personnel. *Id.* at 27a, 44a. Agent Nowicki accordingly contacted ERO personnel on either February 7 or 8 and requested that ERO agents visit the uncle's house to look for Vixama. *Id.* at 11a, 26a, 161a.

On February 21, 2017, ERO agents obtained consent to search, and searched, for Vixama at her uncle's house but did not find her. Pet. App. 11a, 161a. The agents "could not get a straight answer from the occupants" as to whether Vixama was staying there and concluded that they were "'getting the runaround.'" *Id.* at 11a. Agent Nowicki again contacted ERO personnel in March 2017, and spoke to an ERO supervisor to request that they again search for Vixama, but the supervisor informed him that ERO did not have the manpower to search further for her. *Id.* at 11a, 111a.

In April 2017, as petitioners' trial approached, the government tried to locate Vixama by contacting the attorney, David Raben, who had represented Vixama while

she had been detained as a material witness. Pet. App. 11a. On April 12, 2017, the federal prosecutor for petitioners' case emailed Raben to ask for his assistance locating her, explaining that "[s]ince [Vixama] hasn't been deported yet, we are working to determine if she can be located to testify at trial or if she is unavailable to testify." *Id.* at 11a-12a. Raben promptly informed the prosecutor that he had emailed a family member and would keep the prosecutor advised. *Id.* at 12a.

On April 13, 2017, Raben informed the prosecutor that Vixama was in Delaware and did not have a phone but that he had given the prosecutor's contact information to Vixama's boyfriend. Pet. App. 12a. Later that day, the prosecutor emailed Raben a trial subpoena for Vixama, again asked for an address or phone number for her, and asked if Raben knew of any other means to serve Vixama with the subpoena. *Ibid.* Raben responded that he had forwarded the subpoena to Vixama's boyfriend. *Ibid.* That subpoena directed Vixama to appear at trial on April 19, 2017. *Ibid.*

On Saturday, April 15, 2017, the prosecutor contacted Raben again, asking whether he had heard from Vixama and informing him that the government would seek a bench warrant for Vixama if she did not appear at trial. Pet. App. 12a-13a; see *id.* at 46a. Raben responded with the name and phone number of Vixama's boyfriend, telling the prosecutor that she could call Vixama at that number and that Raben "believe[d] [Vixama] w[ould] cooperate." *Id.* at 13a (emphasis omitted). Agent Nowicki promptly called the number, but the call was transferred to a voicemail box that had not been set up. *Id.* at 13a. He also texted the boyfriend's number, identified himself as a federal agent, stated that Vixama

was needed in Miami, and asked that Vixama call him. *Ibid.* The agent received no response. *Ibid.*

On Monday, April 17, 2017, petitioners' trial began and, the next day, a jury was empaneled. Pet. App. 13a, 46a, 54a n.20. The government then moved to admit Vixama's deposition testimony at trial under Federal Rule of Evidence 804 and 8 U.S.C. 1324 because Vixama was unavilable. Pet. App. 14a. Petitioners opposed the motion, arguing that the government had not shown that Vixama was unavailable because it had not made a reasonable, good-faith effort to learn her whereabouts. *Id.* at 14a-15a.

On April 19, 2017, after Vixama failed to appear as directed by the government's subpoena, the district court issued a bench warrant for Vixama, which was entered into the National Criminal Information Center (NCIC) database. Pet. App. 15a. The prosecutor emailed the warrant to Raben and asked him to provide it to Vixama or to her boyfriend or a family member. Gov't Ex. D, at 14 (D. Ct. Doc. 80-4 (Apr. 26, 2017)). Raben said that he would do so. *Ibid.* Agent Nowicki also again unsuccessfully tried to contact Vixama's boyfriend by phone and text. Pet. App. 15a.

Early on April 20, 2017, Raben informed the prosecutor that he had spoken to Vixama's boyfriend and had "explained [the] consequences of [Vixama] failing to contact [the] agent." Pet. App. 15a, 141a. Later that day, the district court held an evidentiary hearing and determined that Vixama was "unavailable" and that the government had made a good-faith, reasonable effort to secure her attendance at trial. *Id.* at 16a; see *id.* at 107a-112a (oral ruling). The court found Agent Nowicki credible and explained that the confusion around the immigration detainer and Vixama's release appeared

to have been caused by the dismissal of the material-witness warrant on a Friday and uncertainly about whether weekend days would be counted toward the 48-hour limit for continuing custody. *Id.* at 107a-108a. The court described the government's efforts to locate Vixama, which included contacting her uncle, obtaining his address, and obtaining ERO's assistance to look for her there; attempting to locate Vixama through her former counsel; getting a subpoena to Vixama despite not knowing her location or contact information; and securing a bench warrant. *Id.* at 108a-111a. The court also noted that the jury had already viewed Francois's video deposition with no objection from petitioners, and that "it was the intent of the parties that Vixama's deposition would also be played by the parties but for the fact that she may have been wrongly released early by the marshals and has now absconded." *Id.* at 112a.

Vixama's video deposition was subsequently played to the jury. Pet. App. 16a. The jury found petitioners guilty on all counts. *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-63a. As relevant here, the court rejected petitioners' argument that the admission of Vixama's videotaped deposition into evidence violated their Sixth Amendment right to confront witnesses against them. *Id.* at 17a-30a, 36a-62a. The court found no error in the district court's determination that Vixama was unavailable based on the government's reasonable, good-faith efforts to secure her presence at trial. *Id.* at 26a, 62a.

The court of appeals explained that Agent Nowicki reasonably requested ERO's assistance in looking for Vixama because Agent Nowicki himself lacked any basis to take her into custody after the material-witness complaint against her had been dismissed, so the only

ground for her seizure was for her immigration detention to facilitate her removal. Pet. App. 26a-27a, 44a-45a. The court found it "patently reasonable" for the prosecutor to reach out to Vixama's material-witness attorney (Raben) for assistance, observing that the government successfully managed to send a trial subpoena to Vixama though counsel and that the government had reason to conclude that its efforts would be successful because Raben had informed them he believed Vixama would cooperate. *Id.* at 27a-28a. The court further observed that prosecution team also tried to contact Vixama's boyfriend multiple times, and that when Vixama did not appear in accordance with the subpoena, the government requested a bench warrant and sent it to Raben, who contacted the boyfriend about it. *Ibid.*

The court of appeals additionally explained that it could not ignore Vixama's "obvious determination to go into hiding and to elude capture," given that she had attempted to sneak into the United States after being denied a visa three times, capitalized on her mistaken release from custody by absconding from the district court's jurisdiction, and would not respond to numerous attempts to contact her. Pet. App. 28a. The court of appeals emphasized that "a reasonable, good-faith effort is case-specific and contextually driven," and it determined that government had undertaken a good-faith effort that was reasonable under the "totality of the unique factual circumstances of this case." *Id.* at 29a-30a, 62a.

b. Judge Rosenbaum dissented in relevant part. Pet. App. 64a-105a. Judge Rosenbaum took the view that the government's efforts to locate Vixama were insufficient on the theory that Agent Nowicki waited too long to follow up with ICE after he gave the agency Vix-

ama's uncle's address; the government "could have followed up with the uncle by sending an agent to the uncle's address to look again for Vixama"; and a "proper follow-up" also required the government to search for Vixama's boyfriend in a database or on Facebook, Twitter, Instagram, or Google in addition to calling and texting him. *Id.* at 75a, 78a; see *id.* at 73a-80a.

ARGUMENT

Petitioners renew their contention (Pet. 25-32) that the evidentiary admission of Vixama's videotaped deposition violated the Sixth Amendment, asserting that the lower courts erred in finding that the government made a good-faith effort to secure her presence at trial and that she was "unavailable" as required by the Confrontation Clause. The court of appeals correctly determined that the government demonstrated a good-faith effort to locate Vixama, and its factbound decision does not conflict with any decision of this Court or another court of appeals. In addition, the atypical factual posture of this case and the overwhelming evidence of petitioners' guilt make this case a poor vehicle for certiorari. No further review is warranted.

1. a. The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." U.S. Const. Amend. VI. That guarantee prohibits the admission of testimonial hearsay in a criminal trial unless the declarant is "unavailable" to testify and the defendant has had a "prior opportunity to cross-examine" the declarant. *Crawford* v. *Washington*, 541 U.S. 36, 53-54 (2004); see *id.* at 59, 68.

An absent witness is "'unavailable'" at trial if the government shows that "the prosecutorial authorities have made a good-faith effort" to obtain the witness's

presence. *Hardy* v. *Cross*, 565 U.S. 65, 69 (2011) (per curiam) (quoting *Barber* v. *Page*, 390 U.S. 719, 724-725 (1968)); see *Ohio* v. *Roberts*, 448 U.S. 56, 74 (1980), abrogated in part on other grounds by *Crawford*, 541 U.S. at 60-68. That good-faith-effort standard "does not require the doing of a futile act" to procure a witness. *Roberts*, 448 U.S. at 74. If "a possibility" exists that "affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation." *Ibid.* Whether such measures must ultimately be pursued—that is, "[t]he lengths to which the prosecution must go to produce a witness"—"is a question of reasonableness." *Ibid.* (citation omitted); accord *Hardy*, 565 U.S. at 70. The reasonableness of the government actions, in turn, depends heavily on the particular facts and circumstances of each case.

In *Barber* v. *Page*, *supra*, this Court held that an absent witness who was incarcerated in federal prison was not "'unavailable'" for a state criminal trial, where state prosecutors could have obtained—but "made no effort to" seek—either a federal writ of habeas corpus *ad testificandum* or a similar state-court writ, which federal prison officials would "normally honor[]." 390 U.S. at 724 & n.5. In that context, the Court determined that state prosecutors had failed to make "a good-faith effort to obtain [the witness's] presence at trial" because the possibility that federal authorities would exercise their discretion to deny a request for the prisoner did not relieve state prosecutors from an "obligation to make any such a request." *Id.* at 724-725 ("[T]he possibility of a refusal is not the equivalent of asking and receiving a rebuff.") (citation omitted).

The Court in *Ohio* v. *Roberts*, *supra*, by contrast, determined that the prosecution "did not breach its duty

of good-faith effort," even though it could have taken "other steps" to secure the absent witness for trial. 448 U.S. at 75. The Court emphasized that good-faith efforts are "a question of reasonableness," *id.* at 74 (citation omitted), and found it sufficient for the prosecutor to have issued subpoenas to the witness at her last address (her parents' Ohio home), even though the prosecutor had learned from the witness's mother months before trial that the witness was traveling out of state and that her mother did not know how to contact her, *id.* at 75. The Court acknowledged that prosecutors might have tried calling a social worker in California who had been in contact with the witness a year earlier and could have taken "other steps" to locate the witness. *Ibid.* But the Court explained that although "[o]ne, in hindsight, may always think of other things," the standard of "reasonableness" did not require such efforts "[g]iven the[] facts" of the case, because it appeared quite unlikely that the additional efforts "would have resulted in locating the witness" to testify at trial. *Id.* at 75-76.

Similarly, in *Hardy* v. *Cross*, *supra*, the Court reaffirmed that "it is always possible to think of additional steps that the prosecution might have taken," but that "the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising." 565 U.S. at 71-72. *Hardy* rejected the court of appeals' determination on habeas review that a state court's holding that a witness was unavailable for trial had unreasonably applied the Court's good-faith-effort jurisprudence. *Id.* at 71. Although the prosecution had not attempted, *inter alia*, to contact the witness's current boyfriend or any of her friends in the area in which she lived, this Court determined that such

attempts were unnecessary because "the record d[id] not show" that the witness's family members or others interviewed by the State "provided any reason to believe that any of these individuals had information about [the witness's] whereabouts." *Ibid.*

b. The court of appeals in this case identified the relevant precedents of this Court, applied them, and correctly determined that the government had made a reasonable, good-faith effort to locate Vixama for trial. Pet. App. 20a-30a, 37a-62a. The court observed that Agent Nowicki promptly tried to locate Vixama after learning of her release, obtained an address from her uncle that ERO agents searched, and later followed up again with ERO personnel. *Id.* at 26a-27a. The federal prosecutor also contacted Vixama's material-witness counsel (Raben) for assistance and was successful in getting a subpoena to Vixama through her boyfriend. *Id.* at 27a-29a. And in communicating with Vixama's counsel, the government was informed that counsel believed Vixama would in fact cooperate. *Id.* at 27a-28a.

Although Vixama did not have a phone and her counsel did not provide her location other than stating she was in Delaware, Agent Nowicki also tried calling and texting the boyfriend multiple times to contact Vixama. Pet. App. 13a-14a, 28a. When Vixama failed to appear at trial as instructed, the government obtained a bench warrant for her arrest, which was entered into the NCIC database and sent to her counsel. *Id.* at 15a, 28a, 133a.

As the court of appeals correctly recognized, Vixama "had a strong incentive not to be found" because she had purposefully entered the United States without permission and then absconded from Florida when the government mistakenly released her. Pet. App. 28a, 30a. The court also explained that "Agent Nowicki had no basis

to take [Vixama] into custody" because the material-witness complaint against her had been dismissed after she gave her deposition, Vixama had not committed a crime that would warrant her arrest and detention, and the only pertinent basis to detain her was for "ICE to take her back into custody" for deportation. *Id.* at 27a, 44a-45a. Thus, "[g]iven the record as a whole and all the investigatory steps that had to succeed to capture [Vixama] in Delaware" on immigration grounds, the court determined that the government had undertaken "a good-faith, reasonable effort to get the trial subpoena to her and to secure her presence at the trial." *Id.* at 49a. The court emphasized that its determination was based on "a highly fact-specific inquiry" and the "totality of the unique factual circumstances of this case." *Id.* at 62a; see *id.* at 29a-30a (discussing the court's "case-specific and contextually driven" analysis based on "the factual circumstances of this case"). Indeed, the court stressed that it was "unware of a [case] similar" to the case here. *Id.* at 24a.

c. The court of appeals' factbound determination does not warrant this Court's review. Although the dissenting judge "would have taken different actions had [she] been the case agent or the prosecutor in this case," Pet. App. 50a—such as searching for the boyfriend's name in a database or on social media, or charging Vixama criminally with no intent to prosecute her simply to justify a warrant for her arrest, *id.* at 78a, 82a & n.9 (dissenting opinion)—the court of appeals explained that "the Sixth Amendment does not require the prosecution to exhaust every possible means of producing a witness at trial," and that the relevant inquiry is to determine "whether the agent's and the prosecutor's actions constituted good-faith efforts that fell within a

zone of reasonableness," *id.* at 50a (majority opinion); see *id.* at 23a. The court also emphasized that the dissenting judge failed to account for the unlikelihood that such a search could have actually produced Vixama at trial and the reasonableness of the government's overall actions. *Id.* at 46a-49a & n.16. That case-specific application of this Court's relevant precedents presents no question warranting certiorari.

That is particularly so in light of the unusual circumstance that petitioners had already agreed that the government could *intentionally* make Vixama unavailable for trial by deporting her. "No one disputes that Vixama was to be deported as soon as she gave her deposition." Pet. App. 19a n.5. Indeed, the parties had specifically agreed on a procedure under which petitioners would be present and would cross-examine Vixama during a videotaped deposition after which "Vixama would be deported immediately to Haiti," thereby making her unavailable and her deposition admissible at trial. *Id.* at 18a; see p. 4, *supra*. Even the dissenting judge below recognized that if the government's efforts to locate Vixama had actually been successful, such that ERO had found and "deported [her], Vixama would * * * have been unavailable for Sixth Amendment purposes." Pet. App. 74a n.4 (dissenting opinion).

That highly atypical context bears on the reasonableness of the efforts to locate her, which would *not* necessarily have secured her presence at trial. Because "Vixama had [already] given her deposition, the material witness complaint [against her] had been dismissed" by court order, thus removing the legal basis to hold her for petitioners' trial. Pet. App. 27a. And because Vixama "had committed no crime" warranting her prosecution, the prosecution team had no basis "to take her

back into custody." *Id.* at 44a. The only pertinent basis to detain Vixama was for "ICE to take her back into custody" for deportation. *Id.* at 45a. But if the government had actually located and secured Vixama, she would have been promptly deported as the parties had already agreed. That would have been true whether Vixama had been located immediately after her release or later, because the government had no basis to detain her for trial against her wishes.

Vixama, of course, could have appeared as a witness at trial through her own volition, perhaps with the encouragement of a government subpoena. But the prosecution team *was successful* in conveying its trial subpoena to Vixama, and Vixama's attorney (Raben) informed the government that he believed Vixama would cooperate. Pet. App. 13a, 28a-29a. Perhaps due to her immigration status, Vixama did not appear at trial voluntarily. The prosecution was then able to secure a midtrial bench warrant, entered the warrant into a national law-enforcement database, and conveyed the warrant to Raben, who explained to Vixama's boyfriend —the only conduit to Vixama—the consequences of her failing to contact the prosecution team. *Id.* at 15a. By the time it had become apparent that Vixama would disregard that as well, the trial was well underway, and the district court had to decide whether the videotaped deposition—the evidence everyone had always anticipated—was admissible. The court reasonably admitted it on the ground that Vixama was unavailable.

Neither petitioners nor the dissenting judge have explained what additional government efforts could have realistically made a difference. Additional efforts to locate Vixama before trial, if successful, would have

resulted—as petitioners had agreed—in her prompt deportation, not her testimony at petitioners' trial. And neither petitioners nor the dissenting judge has shown that the government's efforts during the trial were unreasonable in and of themselves. The very reason why Vixama was even in the country at the time of trial was because she had previously eluded the immigration authorities, and the government reasonably tried to secure her attendance at that point. But it makes little sense to fault the government for asserted deficiencies in earlier efforts that would have resulted only in her pretrial deportation, her undisputed unavailability, and the admission of the same deposition testimony at issue here.

2. Petitioners contend (Pet. 25-32) that the court of appeals erred in three respects, each of which, they argue (Pet. 13-25), implicates a division of authority. Petitioners' contentions, which disregard the unusual factual context of this case, are incorrect.

a. Petitioners first contend (Pet. 25-28) that the court of appeals allowed the government to "curtail its search" for Vixama because the government had already secured her "out-of-court testimony," Pet. 26, noting (Pet. 17) that Agent Nowicki had considered as one factor that "Vixama's videotaped deposition was already taken," Pet. App. 51a. But the court of appeals recognized that Agent Nowicki had weighed multiple factors in determining what course of action would be reasonably calculated to obtain Vixama's presence at trial, *ibid.*, and that "the entire factual context here is relevant and important" to the court's determination that the government's actions were reasonable in light of "all of the particular circumstances of this case together," *id.* at 53a (emphasis omitted); see, *e.g.*, *id.* at

151a, 158a, 161a. And here, the fact that Vixama's deposition had already been taken is quite relevant because, as explained, it eliminated the basis for holding her as a material witness, meaning that—as the parties had long understood—the only ground for holding Vixama (immigration detention) would have simply resulted in her prompt removal from the United States.

Petitioners err in suggesting (Pet. 26-27) that the court of appeals erroneously "collapse[d]" two discrete Confrontation Clause inquiries: a witness's unavailability and a defendant's prior opportunity for cross-examination. The court instead emphasized that "prior cross-examination alone cannot substitute for the government's burden to establish a witness is unavailable." Pet. App. 52a (citing *Crawford*, 541 U.S. at 59); see *id.* at 20a-21a. And in this particular case, the fact that Vixama had been deposed is independently relevant to the reasonableness and good-faith efforts to obtain her presence at trial because that deposition eliminated the possibility of holding her as a material witness. The other ground for Vixama's detention—detention for immigration purposes—would have led to her removal from the United States, not her presence at trial.

Petitioners are thus incorrect in asserting (Pet. 13-17) that this case implicates a division of authority about whether the reasonableness of the government's efforts to secure the presence of a witness at trial should be measured by the efforts that it would take if it had not secured the witness's prior testimony. Courts have viewed that inquiry as a "good measure" for whether the governments' efforts to locate a witness are reasonable and taken in good faith. *E.g.*, *Cook* v. *McKune*, 323 F.3d 825, 836 (10th Cir. 2003). But the court of appeals here did not reject such an inquiry. And none of

the decisions on which petitioners rely (Pet. 13-15) deal with circumstances materially similar to the atypical circumstances here.[*]

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[*] See, *e.g.*, *United States* v. *Burden*, 934 F.3d 675, 682-683 (D.C. Cir. 2019) (government took witness's deposition over the defendant's objection and then deported the witness without making plans for his return for trial; defendants argued that "the government should have sought to keep [the witness] in the country" rather than deport him); *Cook*, 323 F.3d at 832-837 (State failed to seek witness's whereabouts using address where his Social Security disability checks were mailed, to invoke a statutory process to seek aid from out-of-state law enforcement and courts, or to pay money for travel expenses, despite having done so before trial); *Brumley* v. *Wingard*, 269 F.3d 629, 633-635, 641-642 (6th Cir. 2001) (prosecution knew witness was incarcerated in state prison but declined to use statutory procedure that, if invoked, would have obtained his presence for trial, despite doing so before trial); *McCandless* v. *Vaughn*, 172 F.3d 255, 267-269 (3d Cir. 1999) (government obtained bail reduction for cooperating witness but later failed to alter the conditions of his release after having to arrest him repeatedly on bench warrants for his repeated failures to appear in court; officers failed to question witness's wife until two days after jury selection commenced and failed to press her about the witness's location; failed to seek warrant to obtain wife's phone records despite learning of her prearranged meeting with the witness two weeks earlier; and failed to contact witness's other known relatives, even though at least one had strong incentives to keep track of the witness); *United States* v. *Mann*, 590 F.2d 361, 365-368 (1st Cir. 1978) (addressing hearsay exception for "unavailable" witness under Federal Rule of Evidence 804(a)(5), where government "abused [Federal] Rule [of Criminal Procedure] 15(a)" to obtain witness's deposition over defendant's objection; returned the witness's passport and international airline tickets, over defendant's objection, despite likelihood she would not return for trial; chose not to use the "means at its disposal" to prevent her absence; and later made only "perfunctory efforts" to seek her return); *State* v. *Edwards*, 665 P.2d 59, 64-65 (Ariz. 1983) (en banc) (prosecution team failed to use statutory method to secure out-of-state witness's attendance and presented no evidence about

b. Second, petitioners contend (Pet. 28-30) that the court of appeals erroneously held the government could skip an "easy" investigative step that might have led to finding Vixama. Petitioners misconstrue the court of appeals decision and fail to account for the unusual circumstances of this case.

In the passage that petitioners cite (Pet. 28), the court of appeals described the dissenting opinion as advocating a rule under which the government had to "search[] databases in an attempt to discover [Vixama's] boyfriend's address in Delaware" because such "searches are easy." Pet. App. 42a. But the court explained that the government reasonably took other steps and was successful in contacting—and sending a trial subpoena for Vixama to—her boyfriend though Vixama's counsel, who indicated that he believed Vixama would cooperate. *Id.* at 43a; see *id.* at 28a-29a. The court also made "clear" that 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." *Id.* at 42a-43a. The court

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the nature of the search for the witness in Seattle other than a Seattle investigator did not find her); *Brooks* v. *United States*, 39 A.3d 873, 886-888 (D.C. 2012) (government failed to identify or contact witness's attorney whom the witness told the prosecutor she need to consult before she disappeared from D.C. courthouse a couple of hours before her testimony, made limited efforts to contact witness's family and boyfriend, and refused defense counsel's suggestion to contact law enforcement or hospitals in Virginia where witness had previously been arrested); *State* v. *Lee*, 925 P.2d 1091, 1102-1103 (Haw. 1996) (prosecution team never issued trial subpoenas for witnesses, made no effort to locate one witness after learning he had left the state, and failed either to call the work pager of another witness or to attempt "any follow-up" efforts after concluding that he had moved).

further explained that the dissent's purportedly "easy" step failed to account for the unlikelihood that the subsequent actions required to obtain Vixama's presence at trial would occur. *Id.* at 46a-49a & n.16. That analysis directly parallels this Court's decision in *Hardy*, where the record similarly failed to show that the additional step of contacting the witness's boyfriend or friends would have likely produced further meaningful information beyond that already obtained through other investigatory efforts. See pp. 13-14, *supra*.

Petitioners' reliance on *Roberts's* statement that a "remote" possibility that additional measures might produce a witness for trial "*may* demand their effectuation," *Roberts*, 448 U.S. at 74 (emphasis in original), to argue that any such "'remote' prospect" means that "[t]he government *must* take" such measures, Pet. 28 (emphasis added), is mistaken. Indeed, the Court's very next sentence in *Roberts* makes clear that "[t]he lengths to which the prosecution must go to produce a witness is a question of reasonableness." 448 U.S. at 74 (citation omitted). And as the Court's application of the reasonableness standard reflects, the reasonableness standard takes account of the particular factual circumstances of the case. See pp. 12-14, *supra*. Although "it is always possible to think of additional steps that the prosecution might have taken to secure the witness' presence" when a witness absconds before trial, government is not required to "exhaust every avenue of inquiry" as a prerequisite a finding of reasonableness. *Hardy*, 565 U.S. at 71-72; see *Roberts*, 448 U.S. at 75.

Petitioners similarly err in arguing (Pet. 17-21) that this case implicates a circuit conflict on whether the government may forgo a low-cost investigative step that

it has reason to believe would procure a witness's presence at trial. Petitioners cite (Pet. 18-19) decisions that evaluate the specific circumstances in each case to determine whether the government's overall efforts were "reasonable" under those circumstances. But those decisions reflect no division of authority relevant here. Indeed, petitioners have failed to identify any relevant decision involving circumstances substantially similar to the atypical circumstances in this case. See *United States* v. *Tirado-Tirado*, 563 F.3d 117, 120, 123-124 (5th Cir. 2009) (government deported witness to Mexico without giving him a subpoena or "any sort of written notice" regarding the trial, informed the witness of the "prospect that he would be required to return to testify" only orally and "in relatively vague and uncertain terms," and made no effort to contact witness for more than two months after trial date was set until only eight days before trial); p. 20 n.1, *supra* (discussing *McCandless* (3d Cir.) and *Brumley* (6th Cir.)).

c. Finally, petitioners contend (Pet. 30-32) that *Motes* v. *United States*, 178 U.S. 458 (1900), is "on all fours" with this case and shows that the mistaken release of Vixama from custody cannot be cured "even [by] a 'diligent search'" for her. That is incorrect.

In *Motes*, an order by a federal commissioner required that the witness in question (Taylor) be detained in jail pending the trial. 178 U.S. at 468. Despite that order "commit[ing] [Taylor] to jail without bail," the federal officer working on the prosecution "*in violation of law* took [Taylor] from jail," allowed him to stay in a hotel with his family without official supervision, and did not even supervise the witness on the day he was to appear for trial. *Id.* at 471 (emphasis added); see *id.* at 468. Taylor then escaped. *Id.* at 468. In that context,

where Taylor had not "gone out of the State" beyond the trial's court jurisdiction and his absence from trial was "plainly" "attributed to the negligence of the prosecution," the Court determined that the admission of Taylor's earlier testimony at a preliminary hearing violated the Confrontation Clause. *Id.* at 474; see *id.* at 471.

This case is significantly different. Vixama was released pursuant to—not in violation of—the court order dismissing the material-witness complaint against her, and the prosecution team was unaware that Vixama would be discharged from custody on the material-witness warrant before ERO personnel could take her back into immigration detention. Petitioners themselves acknowledged below that "the government could not foresee that [Vixama] would be inadvertently released" on Monday based on the Friday court order, and petitioners therefore argued only that the government's *subsequent* efforts were insufficient to constitute a good-faith effort to obtain Vixama's presence for trial. Smith Mot. to Exclude Dep. 3; see 4/20/2017 Tr. 93-99. The court of appeals thus did not have occasion to address petitioners' current contentions regarding the events leading to Vixama's release.

Moreover, unlike *Motes*, where the prosecution team's violation of the law prevented the witness from testifying, the negligence that petitioners attribute to the government is a failure to have secured custody of Vixama for immediate removal from the United States, *i.e.*, a failure to take action that would itself have made Vixama unavailable for trial. Again, "the parties agreed [Vixama] would be deposed and then deported back to Haiti," and "[n]o one disputes that Vixama was to be deported as soon as she gave her deposition." Pet. App.

9a n.1, 19a n.5. Thus, while it makes sense to hold the government to account for a violation of a court order that results in the witness's absence, see *Motes*, *supra*, the same does not hold true here, where Vixama was released pursuant to a court order and the failure to detain her for her immediate removal merely meant that Vixama was *more* likely to be available for trial.

Petitioners are thus incorrect in arguing (Pet. 22-24) that the court of appeals' good-faith-effort determination conflicts with decisions of appellate courts that reflect that the prosecution must take action "to secure a witness's attendance at trial before releasing that witness from its custody." Petitioners fault (Pet. 24) the court of appeals for analyzing only the government's actions after Vixama's release, but the court did not address allegedly deficient prerelease conduct because petitioners did not preserve such an argument. See p. 24, *supra*. In any event, the decisions on which petitioners rely (Pet. 22-23) all involve circumstances that are materially different from those here, where petitioners agreed that the government could intentionally make Vixama unavailable at trial (by deporting her) and thereby use her deposition at trial. See, *e.g.*, *United States* v. *Yida*, 498 F.3d 945, 952, 957-960 (9th Cir. 2007) (finding that the government failed to use "'reasonable means'" to procure declarant's presence under Federal Rule of Evidence 804(a)(5)'s hearsay exception, where the government deported the declarant without informing defense counsel and with "no reasonable expectation that [he] would return to testify if asked," given that the government had "alternatives available" other than deportation); pp. 20-21 n.1, *supra* (discussing *Burden* (D.C. Cir.), *Mann* (1st Cir.), and *Brooks* (D.C.));

p. 23, *supra* (discussing *Tirado-Tirado* (5th Cir.)). Indeed, the unique circumstances presented in this case underscore why certiorari is unwarranted.

3. In any event, this case would be a poor candidate for review because any error in admitting Vixama's testimony was harmless. Petitioners refer (Pet. 1) to Vixama as the government's "star" witness. But as the court of appeals recognized, "Vixama's testimony was strikingly similar to Francois's" and the government presented "overwhelming trial evidence of alien smuggling" in this case. Pet. App. 2a, 6a; see *id.* at 57a.

Petitioners were discovered on a boat filled with Haitian migrants, none of whom had identification documents. Pet. App. 4a; 4/19/2017 Tr. 16-17, 43. Petitioners' asserted that they were traveling within the Bahamas from Freeport to Bimini, not to the United States. Pet. App. 3a; 4/19/2017 Tr. 8; 4/18/2017 Tr. 87. But that explanation did not make sense in light of the northerly currents in the region, which would not have brought the boat south of Bimini and within about 24 miles from Key Largo. Pet. App. 2a-3a; 4/18/2017 Tr. 29, 45, 57-58, 77, 87-88. And petitioners' self-serving assertion of their destination was further undermined by Smith's prior conviction for alien smuggling for profit and Delancy's prior conviction for illegal reentry after removal. Pet. App. 4a, 57a. Petitioners' initial refusal to board the Coast Guard cutter after days at sea without food and with little water likewise emphasized the criminal nature of their enterprise. *Id.* at 3a.

The video deposition testimony of Francois, which was admitted without objection, also told the same basic story as Vixama's. Pet. App. 57a. Francois testified that he left Haiti for Freeport before taking a boat to come to the United States for school. Francois Dep. Tr.

5-8, 22, 46 (D. Ct. Doc. 86-1 (Apr. 28, 2017)). He testified that other passengers on the boat also understood that they were headed to the United States. *Id.* at 22. And Francois testified that Delancy told the passengers not to signal other boats even after they were left adrift at sea. *Id.* at 18-19. Francois's direct testimony that petitioners were transporting the boat passengers to the United States, which was corroborated by the balance of the trial evidence, illustrates that Vixama's cumulative testimony did not alter the outcome of petitioners' case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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